Court, U.S.

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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE CESSNA AIRCRAFT COMPANY,
Petitioner,

v.

JOHN H. DALTON, SECRETARY OF THE NAVY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an Executive Branch agent can obligate and spend newly appropriated funds before the President has apportioned those moneys as required by statutes intended to effect Congress' plenary authority under Article I, Section 9, Clause 7 of the Constitution?

Whether a valid contract can exist notwithstanding the fact that it is based on violations of statutes and regulations governing the obligation of funds from the Treasury?

Whether a contractor has standing to challenge the validity of a contract that was based on a violation of statutes and regulations and that caused financial harm to that contractor?

RULE 29.6 STATEMENT

Petitioner The Cessna Aircraft Company is a wholly-owned subsidiary of Textron Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner The Cessna Aircraft Company ("Cessna") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit. The Federal Circuit ruled that an Executive Branch agent can obligate and expend funds from the Treasury before completion of the apportionment process mandated by statute and regulations and that a private party cannot recover damages arising out of any violation of those statutes and regulations. In so ruling, the Federal Circuit held that Cessna lacked standing to challenge the validity of its contract with the government, even though there is no dispute that the Navy failed to apportion the moneys as required by law prior to obligating them to that contract.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 126 F.3d 1442 (Fed. Cir. 1997). The opinions of the Armed Services Board of Contract Appeals (App. 1b, 1c) are reported at 96-1 BCA ¶ 27,996 and 93-3 BCA ¶ 25,912.

JURISDICTION

The Court of Appeals entered judgment on October 6, 1997. Cessna's timely filed petition for rehearing was denied on February 27, 1998. App. 1d. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, Section 9, Clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

The appendix (App. 1e) sets forth verbatim the following statutory provisions: 3 Stat. 567(1820); Section 7, 16 Stat. 230, 251 (1870); Section 4, 33 Stat. 1214, 1257 (1905); Section 1211, 64 Stat. 763, 765 - 768 (1950); 31 U.S.C. §§ 1341, 1511-1519 (1994).

The appendix (App. 1f) sets forth verbatim the following regulatory provisions: DOD Directive 7200.1 (May 7, 1984); DOD Accounting Manual (Feb, 1988); Navy Comptroller Manual.

STATEMENT OF THE CASE

This petition asks the Court to review for the first time a question of profound significance to all persons who contract with the federal government—whether an Executive Branch official can disregard statutory and regulatory provisions governing the disposition of funds appropriated pursuant to Article I, Section 9, Clause 7 in order to require a contractor to render performance and the more fundamental question of whether such official can obligate and expend such unapportioned funds. This case presents an effort by the Executive Branch to undermine a statute (requiring the apportionment of funds before they are obligated and spent) that is the cornerstone of a comprehensive set of statutes imperative to the effective application of Article I, Section 9, Clause 7 of the Constitution. "No Money may be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." U.S. Const. art. I, § 9, cl. 7. With this statement, the Constitution grants exclusively to the Congress the power of the purse -- a power that cannot be delegated by the Legislature. Fidelity to our constitutional form of government also prohibits both the Executive and Judicial Branches from disregarding Congress' plenary authority to control federal expenditures. That, however, is precisely what has occurred here.

In the name of expediency, a low-level Executive Branch bureaucrat obligated Treasury funds for a contract by disregarding constitutionally based statutes and regulations governing how money must be drawn from the Treasury. Then, bowing to irrelevant program considerations, the United States Court of Appeals for the Federal Circuit, the only Article III court likely to address these issues again, condoned a result whereby such bureaucrats can disregard these constitutionally based statutes and regulations with impunity. This result is contrary to Article I, Section 9, Clause 7 of the Constitution, the statutes enacted to effectuate the purpose of that Clause, the regulations promulgated to effect the purpose of those statutes, and instructive opinions of this Court. This Court, however, has never addressed the fundamental issue presented here: whether the Executive and

Judicial Branches may disregard the manner in which Congress has determined to control the power of the purse.

The Court should grant the petition for three reasons. First, the Federal Circuit panel decision in this case allows Executive Branch officials to circumvent a statutory and regulatory scheme designed to protect Congress' "power of the purse." As explained below, consideration of this issue by this Court is long overdue. Second, the decision of the Federal Circuit (the only Court of Appeals likely to consider the issue) conflicts with precedent of this Court addressing analogous statutes as well as the plain language of the statutes at issue. Review by this Court, therefore, is essential to preserving the Congress' "power of the purse." Third, the decision conflicts with Supreme Court jurisprudence on standing, which was necessarily disregarded by the Federal Circuit in order to reach its holding.

A. The Statutory Scheme Enacted By Congress To Implement Article I, Section 9, Clause 7

Article I, Section 9, Clause 7, and its implementing laws, enjoin the Executive from spending money in the name of the United States except as provided by the Congress. As discussed below, for nearly two hundred years, the Congress has been enacting a panoply of Acts designed to protect its prerogative to control federal expenditures pursuant to Clause 7. These statutes (principally the Anti-Deficiency Act) and their implementing regulations prohibit Executive Branch officials from obligating and expending moneys on behalf of the United States prior to sufficient funds being appropriated *and apportioned*. That is, the passage of an adequate appropriation alone does not free the Executive to obligate and expend funds from the Treasury. Under the applicable statutory scheme, funds remain legally *unavailable* until the Executive Branch has completed a mandatory series of actions apportioning an appropriation to ensure that funds will remain available throughout the fiscal year.

1. The History Of The Anti-Deficiency Act

The cornerstone of the statutory scheme enacted to preserve the power of the purse is the Anti-Deficiency Act, 31 U.S.C. § 1341. The genesis of this legislation was an 1820 Act entitled, "An Act in addition to the several acts for the establishment and regulation of the Treasury, War and Navy Departments." Ch. 52, 3 Stat. 567 (1820) ("the 1820 Act"). App. 1e. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1370- 1372. It's purpose was to prevent the Executive Branch from incurring "coercive" deficiencies that effectively circumvented Congress' power of the purse. *Id.* at 1370. Under the terms of section 6 of the 1820 Act, "no contract shall hereafter be made . . . except under a law authorizing same, or under an appropriation adequate to its fulfillment; . . . " App. 1e. With this Act began a long history of many attempts by the Congress to enjoin the Executive from disregarding Article I, Section 9, Clause 7. As set forth below, continued resistance or disregard by the Executive of this fundamental constitutional tenet continues to this day and in this case.

The scope of the 1820 Act was clarified and expanded by the act of July 12, 1870, ch. 251, § 7, 16 Stat. 251 (1870) ("the 1870 Act"). App. 1e. Under the 1870 Act, no government could commit to the expenditure in any fiscal year of any amount in excess of appropriations for that year or involve the government "in any contract for the future payment of moneys in excess of such appropriations." Section 7, 16 Stat. 251 (1870). App. 1e. Under the terms of the 1870 Act, any contract to pay a sum "in excess of that limited by Congress" was a nullity. *Hooe v. United States*, 218 U.S. 322, 334 (1910). This statute was enacted specifically to address "the problem" that Executive Branch officials obligated moneys in advance of appropriations and then sought deficiency appropriations from Congress, which had little choice but to provide them. App. 18a. By prohibiting the Executive Branch from incurring these deficiencies, Congress sought to ensure that its power of the purse would not be undermined. *See* Stith, 97 YALE L.J. at 1371-72.

2. Congress Requires The Executive To Apportion Appropriated Moneys

To further restrain the Executive's over-commitment of funding, the scope of the 1870 Act was expanded by the General Deficiency Bill of 1905, ch. 1484, § 4, 33 Stat. 1257 (1905) ("the 1905 Act"). App. 2e-3e. The 1905 Act contained two equally significant new provisions. First, "[a]ll appropriations made for contingent expenses or other general purposes" had to be apportioned to ensure availability of funds for the entire fiscal year. 33 Stat. 1257-58. *Id.* By requiring that all appropriations be apportioned, the statute was intended to prevent the Executive from spending all available funds prior to the end of the fiscal year and requiring that Congress appropriate additional money in order to meet the government's needs for the remainder of the year and to avoid coercive deficiencies. Second, the 1905 Act established sanctions, including criminal penalties, for those who ignored its dictates. 33 Stat. 1258. App. 3e. These sanctions remain in effect today. 31 U.S.C §§ 1518-19 (1994). App. 19e.

Incorporated as part of the General Provisions of the General Appropriations Act of 1951, ch. 896, § 1211, 64 Stat. 763, 765-68 (1950) ("the 1950 Act"), the 1950 Act revised and subdivided the Anti-Deficiency Act and related laws in a manner largely consistent with their current structure. *Compare* Section 1211, 64 Stat. 765-66 *with* 31 U.S.C. §§ 1341, 1512-19 (1994). App. 3e-9e; 10e-19e. Most importantly for present purposes, new subsections further defined the apportionment process, including the manner in which that apportionment process must occur. *See* 31 U.S.C. §§ 1512-14. App. 12e-16e. *See generally*, GAO/OGC-92-13 *Appropriations Law* -- Vol. II, at 6-72 - 6-99 ("the GAO Accounting Manual").

31 U.S.C. § 1512 requires apportionment of all funds available for obligation for a limited period of time in order to avoid the need for supplemental appropriations:

> Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period.

31 U.S.C. § 1512(a). App 12e.[1/] After funds have been apportioned by the Office of Management and Budget, the statutory process continues. Funds must be "allocated" by the executive agency, and then "suballocated" within the agency. 31 U.S.C. §§ 1512-1514. App. 12e-16e. Only when this process has occurred can an officer of the Government *legally* obligate funds from the Treasury:

> An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding (1) an apportionment; . . . .

31 U.S.C. § 1517(a). App. 18e-19e. Thus, under the statutory scheme enacted by Congress to protect its power of the purse, Executive officials are prohibited from entering into contracts and from authorizing or creating obligations or expenditures in excess of amounts apportioned and administratively subdivided below the apportionment level.

To further ensure compliance with the statutory scheme, 31 U.S.C. § 1514(a) requires Executive agencies to implement regulations to effectuate the mandated apportionment process, which have the force and effect of law. App. 15e. For the

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1/ 31 U.S.C. § 1513(b) designates the President as the apportioning official. The President delegated this responsibility the Director of the Bureau of the Budget (now the Director of the Office of Management and Budget) pursuant to Exec. Order No. 6166, § 16 (June 10, 1933).

Department of Defense ("DOD"), these regulations are contained in DOD Directive 7200.1, dated May 7, 1984 and the DOD Accounting Manual. DOD Directive 7200.1 restricts authority to obligate funds to the amount that has been apportioned and forbids obligations in excess of the amount apportioned. App. 13f-14f. That prohibition is further reinforced by the DOD Accounting Manual, which states the following:

> For apportioned funds, a violation of DOD Directive 7200.1 is a violation of 31 U.S.C. § 1517. (reference (v)). Since DOD Directive 7200.1 was issued pursuant to 31 U.S.C. § 1517, it has the force an effect of law.

DOD Accounting Manual at 21-5. App. 18f.

The Navy, too, has implemented a similar regulatory scheme, which is set forth in the Navy Comptroller Manual ("NCM"). The NCM imposes a sequential funding process whereby funds first are apportioned, then allocated to the Secretary of Defense, and then allotted, suballotted, and committed through the chain of command in the Navy. NCM ¶ 073002. App. 22f. Once this process is completed, a Navy contracting officer then may *legally* obligate funds to a Navy contract.

3. The Federal Circuit Decision

The requirement for apportionment of any appropriated funds prior to their being obligated and expended on a government contract is a fundamental principle of federal funding law. The decision of the United States Court of Appeals for the Federal Circuit is in conflict with that principle. Under the Federal Circuit's existing decision, a subordinate agency official can obligate moneys prior to their being apportioned without violating 31 U.S.C. § 1517 even though the President would be precluded from ensuring that those moneys are spent so as "to achieve the most effective and economical use," as required by 31 U.S.C. § 1512. App. 12e-13e.

Moreover, under the Federal Circuit's decision, violation of the apportionment statutes has no effect on the legality of the contract arising out of that very violation. *See* App. 26a-27a. That notion is contrary to precedent established by this Court over a century ago. *See Clark v. United States*, 95 U.S. 539 (1877). Notwithstanding that precedent, the Court of Appeals decision would permit agents for a procuring activity within a subordinate executive department to disregard statutes and regulations with impunity whenever expediency and parochial self-interest warranted doing so, and the contractor, not the government, must bear the financial consequences of the agency's conduct.

The very contractor that must bear the burden of the government agent's disregard for the law would have no standing to complain about that violation if the decision of the appeals court remains the law. App. 26a-27a. The rationale for the court's opinion on this score is essentially that laws governing the expenditure of money for government contracts are of no consequence to the contractor that is to receive those funds. *Id.* Since the laws were not intended for the benefit of the contractor they have no standing. *But see National Credit Union Administration v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 935 (1998). But this Court has recently ruled that such a contract may be abrogated by the government, and therefore the interest of a contractor is compelling. *See Hercules, Inc. v. United States*, 116 S. Ct. 981 (1996).

B. Background Of The Case

Cessna and the Navy entered into a contract that had a number of pertinent characteristics for present purposes. First, the contract was funded with annual appropriations -- the Navy was required to obligate funds each year to the contract, after Congress had appropriated those funds. App. 4c. As a result, the Navy was required to comply with the statutes and regulations governing the obligation of those funds. These include the foregoing apportionment statutes, the subdivision statutes, and the regulatory provisions that were promulgated as required by 31 U.S.C. § 1514, which have the force and effect of law. One such

regulatory provision was the DOD Accounting Manual, which states in part that "apportionments and reapportionments by OMB are required *before* funds may be obligated." App. 23a. There is no dispute that the Navy obligated funds before they were apportioned.

On May 10, 1983, the Navy awarded Cessna a contract that was administered by the Naval Air Systems Command ("NAVAIR"). App. 2c. The Navy funded the contract with operations and maintenance ("O&M") moneys. App. 3c. These are one-year funds that can be expended only for services performed in the fiscal year for which the funds are appropriated. App. 3c. The contract had a basic performance period of five program years, fiscal years ("FYs") 1984-1988. *See* App. 5c. It also had a provision for one three-year option for FYs 1989-1991. App. 4c.

As of September 30, 1988, Congress had not passed and the President had not signed the DOD appropriations bill for FY 1989, which would fund DOD activities for the fiscal year beginning on October 1, 1988. App. 12c. At the conclusion of a September 30 meeting between representatives of Cessna and NAVAIR, the NAVAIR contracting officer obtained from the NAVAIR Comptroller a funding sheet that would be necessary to obligate the funds necessary to exercise the first option. App. 12c. The Financial Accounting Data ("FAD") sheet that was post-dated to October 1 and contained the following proviso: "EXECUTION OF THIS DOCUMENT IS CONTINGENT ON CONGRESSIONAL PASSAGE OF THE FY-89 DOD APPROPRIATION ACT OR OTHER AUTHORITY." App. 5b-6b.

On the morning of Saturday, October 1, 1988, after the end of the 1988 fiscal year, the contracting officer's supervisor told the contracting officer that he did not know whether the appropriations bill had been signed into law. App. 6b. Later, a NAVAIR supervisor called the Navy's Chief of Information office at the Pentagon to determine whether the President had signed the

bill. No one answered the telephone. The supervisor then called a local radio station, where someone told him the defense appropriations bill was one of several bills that the President had signed into law. App. 14c. The supervisor then left a message on the contracting officer's answering machine, stating that the President had signed the bill. *Id.*

When the contracting officer received the message, she went to her office. Alone in her office, she took the FAD sheet given to her by the Comptroller's office, and proceeded to alter it by whiting out the proviso. App. 6b. She then redrew the vertical lines on the form over the white out to hide her alteration of the document from Cessna. App. 6b. She had neither sought nor received any authority to alter the document. Nor was she aware of whether or not funds were actually available with which to exercise the option.[2/] *See* App. 6b; 14c. She signed the option exercise modification and addressed the document to Cessna. App. 6b; 14c.

Through her actions, the contracting officer purported to obligate more than $22 million to fund the first option year. App. 6b. At the time she took this action, FY 1989 funds had not been apportioned, allocated, suballocated, or committed, as required by law and regulation. App. 24b.

By letter dated October 7, 1988, Cessna formally notified the contracting officer the option exercise was ineffective. App. 17c. Cessna stated that it would continue to perform contract-type services and would submit a proposal to the Navy that would address payment for continued services. App. 17c. The contracting officer responded to Cessna's October 7, 1988 letter

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2/ Only the NAVAIR Comptroller could "commit" the funds, a step necessary before her obligation of them, and he had not done so. NCM ¶ 073001. App 20-21f.

by letter dated December 7, 1988. App. 19c. In this letter, she took the position that the option was properly exercised, thereby directing Cessna to continue performance. App. 19c. Cessna continued to perform services until September 30, 1991, when the option period ended. The Navy continued to demand and accept services during the three year purported option period.

C. This Litigation

On April 8, 1991, Cessna submitted a certified claim to the contracting officer pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601-609 (1994). App. 10a. The contracting officer denied the claim, and Cessna appealed the decision to the Armed Services Board of Contract Appeals ("ASBCA") pursuant to 41 U.S.C. § 607(d). App. 11a. The adverse decision of the ASBCA was then appealed to the United States Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295(a)(10). App. 12a. On October 6, 1997, the Federal Circuit issued an opinion adverse to Cessna. App. 1a. Cessna timely filed a petition for rehearing. That petition was denied on February 27, 1998. App. 1d.

REASONS FOR GRANTING THE WRIT

A. The Actions Of The Navair Contracting Officer Frustrated The Purpose Of Laws Intended To Protect The Treasury.

This case raises legal issues concerning the Anti-Deficiency Act and its subordinate statutes. The Comptroller General has explained the genesis of the Act as follows:

> The Anti-deficiency Act was born as a result of Congressional frustration at the constant parade of deficiency requests for appropriations it was receiving in the 19th century and early 20th century, generated, it believed, by the lack of foresight and careful husbanding of funds by Executive branch agencies. (See Annals of Congress 10th Cong., 2d Sess. 1809.) A consistent theme runs through myriad pages of floor debates and reports on supplemental appropriation bills: The Congress was tired of receiving appropriation requests which it could not, in good conscience, refuse because the agency had legally or *morally* committed the United States to make good on a promise. We term such commitments "coercive deficiencies" because the Congress has little choice but to appropriate the necessary funds.

Project Stormfury, 59 Comp. Gen. 369, 372 (1980).

In response to repeated unfunded obligations made by the Executive Branch, Congress has over the course of nearly two hundred years enacted a series of laws (currently codified as the Anti-Deficiency Act and related statutes) governing the manner in which the Executive may spend money. *See* 31 U.S.C. §§ 1511-1519, 1341-1342; *see generally* Stith, 97 YALE L.J. at 1370-1372. Congress' exclusive and plenary power to authorize the expenditure of United States funds is granted by the Constitution. U.S. Const. art I, § 9, cl. 7. Thus, the Act and its subordinate statutes serve as a statutory mechanism to enforce Congress'

constitutional right to control the power of the purse. They enjoin the Executive from spending money in the name of the United States except as provided by the Congress. *See Harrington v. Bush*, 553 F.2d 190, 194-95 (D.C. Cir. 1977); Secretary of the Air Force 42 Comp. Gen. 272, 275 (1962).

Each step in the appropriation and apportionment process is a condition precedent that must be satisfied by the Executive Branch prior to its entering into contracts or obligating any money from the Treasury. Strict adherence to these rules is therefore necessary to preserve Congress' power of the purse -- the ability to place conditions on the manner in which money is to be used. If the laws are not strictly enforced, Congress' ability to control the appropriations process becomes illusory.

By adopting the Anti-Deficiency Act and the supporting statutory scheme, Congress made clear that the Executive Branch may not *legally* obligate funds until authorized government officials complete an ordered, mandatory series of actions. For the sake of expediency, a low-level bureaucrat disregarded these constitutionally based statutes and regulations. For similarly irrelevant practical considerations, the Federal Circuit, the court before which these issues almost exclusively arise, declined strictly to enforce the very statutes disregarded with impunity.

The Federal Circuit's reasoning is certainly contrary to instructive opinions of this Court, such as *Hercules*, 116 S. Ct. at 987, wherein this Court held that the Anti-Deficiency Act must be strictly construed. However, this Court has never squarely addressed the aspect of the power of the purse presented in this case: whether and Executive Branch official can disregard the apportionment process mandated by Congress to effect Article I, Section 9, Clause 7. Prior Supreme Court cases have dealt with the Executive's cavalier attitude towards the Anti-Deficiency Act's appropriation condition precedent. *See, e.g., Hooe v. United States*, 218 U.S. 322 (1910) (executive officer is without authority to bind government to pay amounts in excess of appropriations);

Sutton v. United States, 256 U.S. 575 (1921) (Secretary of War obligation authority limited to amount specifically appropriated).

The case of *Clinton v. City of New York*, 118 S. Ct. 1551 (1998), which is currently pending before the Court, raises an issue similar to (and certainly as important as) the one presented here: the constitutionality of the Line Item Veto Act, in which Congress has delegated to the Executive certain authority over appropriated moneys. While both cases address delegation of control over the purse strings, the *Clinton* case will leave unresolved by this Court the issue of whether an Executive Branch official can disregard the limits placed on that Branch by the Congress before obligating and expending money. Moreover, since the issue presented here almost always arises in the procurement context, only the Federal Circuit is likely to espouse an appellate view on the subject. For the reasons set forth herein, that view is constitutionally flawed, but it will likely go unchallenged except upon review by this Court.

The pending issue lies at the heart of Congress' constitutionally granted control of appropriations. Although based on a complex set of statutes, the mandatory process that was violated by the Executive official is clearly defined by those statutes. First, Congress must appropriate the funds. 31 U.S.C. § 1341(a)(1)(B). Second, the President, through the Office of Management and Budget, must apportion the funds, i.e., distribute budgeted amounts to the Executive Branch agencies. 31 U.S.C. § 1512. Third, the executive agency must allocate, allot, and suballot the apportioned funds down to the subagency level. 31 U.S.C. §§ 1512-14. Fourth, the agency must commit the funds to a contract. *Id.* Then, and only then, may a contracting officer legally obligate funds to a contract. 31 U.S.C. § 1517. None of these steps, starting with apportionment was followed and the Federal Circuit's decision effectively gave every contracting officer *carte blanche* to usurp each regulatory step.

To emphasize the importance of these rules, Congress directed the Executive Branch to promulgate implementing regulations

that also require compliance with this mandatory sequential process. 31 U.S.C. § 1514(a). Regulations issued pursuant to section 1514(a) have the force and effect of law, and compliance with those regulations is mandatory because section 1517 prohibits the violation of such regulations. Thus, violation of the Act, its subordinate statutory provisions, and the implementing regulations each constitute a violation of the apportionment statutes. *See Housing and Home Finance*, 37 Comp. Gen. 220 (1957).[3/]

As still one more means of ensuring that the Executive Branch will follow these requirements and avoid "coercive deficiencies,"[4/] Congress also prohibited the Executive Branch from accepting voluntary services. 31 U.S.C. § 1342. The prohibition on voluntary services precludes agencies from accomplishing the same result indirectly "by accepting ostensibly 'voluntary' services, and then presenting Congress with the bill." GAO, *Principles of Federal Appropriations Law*, ch. 6, at 56 (1992).

Finally, in recognition of the importance of the principles underlying the Anti-Deficiency Act, Congress imposed a criminal

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[3/] DOD's implementing regulations are contained in the DOD Accounting Manual and DOD Directive 7200.1, dated May 7, 1984. The Navy's further implementing regulations include those set out in the Navy Comptroller Manual ("NCM"), Navy Comptroller Instructions, and NAVAIR Instructions.

[4/] The Comptroller General defines "coercive deficiencies" as "appropriation requests which [the Congress] could not, in good conscience, refuse because the agency had legally or *morally* committed the United States to make good on a promise." 59 Comp. Gen. at 372; *see* Herbert L. Fenster and Christian Volz, *The Anti-Deficiency Act: Control Gone Astray*, 11 PUB. CON. L.J. 155 (1979).

penalty on government employees who violate the act. 31 U.S.C. § 1350.

The Federal Circuit let stand the underlying factual finding that the Navy did obligate funds before they were apportioned. The court then refused to grant Cessna any relief on the grounds that the provisions disregarded were intended to benefit only the Government, necessarily understood to mean the Executive. In reaching that result, the Federal Circuit's decision conflicts with existing precedent of this Court, and rests on grounds rejected in case law of this Court. *See National Credit Union Admin. v. First National Bank & Trust Co.*, 118 S. Ct. 927 (1998). In effect, the Federal Circuit has resurrected a law of standing that has been dead for twenty years. Because the Federal Circuit's opinion condones the Navy's behavior, Executive bureaucrats may violate statutes and regulations with impunity. The Federal Circuit then left to the contractor, not the government, the consequences of the government's illegal conduct.

Under the Federal Circuit's reasoning, the contractor would have to continue performing even though the government could (or *must*) abrogate the contract. *See Hercules, Inc. v. United States*, 116 S. Ct. 981 (1996). Under applicable case law, if only the government can avoid the contract, then the contract should be unenforceable due to lack of mutuality of obligations. *See, e.g., Lynch v. United States*, 292 U.S. 571, 579 (1934) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between individuals."); *see also, Winstar v. United States*, 518 U.S. 839 (1996). However, under the Federal Circuit's holding, the contractor lacks standing to determine the legality of its own contract.

In rejecting Cessna's arguments that the NAVAIR official violated the governing statutes by obligating moneys *before* they were apportioned, the Court of Appeals distinguished 31 U.S.C. § 1341(a), which prohibits the government from incurring obligations in advance of appropriations, from 31 U.S.C §§ 1511-

1519, the apportionment provisions of the Anti-Deficiency Act. The court did so on the grounds that unlike section 1341(a), sections 1511-1519, contain no timing limitations, and because section 1517 "says nothing about incurring obligations prior to carrying out the apportionment process." App. 25a. To the contrary, the sections are not distinguishable. In fact, the operative language "distinguished" by the court is virtually identical.

Section 1341(a)(1) provides as follows:

> An officer or employee of the United States Government or of the District of Columbia government may not (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for–the expenditure or obligation.

Section 1517(a) provides as follows:

> An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding (1) an apportionment.

The only difference between section 1341(a), in which the appeals court recognizes the order of precedence, and section 1517(a)(1), in which the court finds none, are the words that follow "exceeding." Section 1341 deals with obligating amounts *exceeding an appropriation*, and section 1517 addresses the obligation of amounts *exceeding an apportionment*. Aside from that difference, *i.e.*, the pertinent step in the funding process, the two provisions are identical. Both prohibit the obligation of moneys *in advance of* the specified event in the funding process.

The Federal Circuit also relied on the notion that obligating and expending funds *before* they are apportioned means that they were not obligated in *excess* of an apportionment. Logic dictates

that if the Executive official can avoid the prohibition against obligating funds in excess of an apportionment by simply obligating them before they are apportioned, the apportionment provision becomes meaningless. The actions of the low-level bureaucrat have deprived the President, the Secretary of Defense, the Secretary of the Navy, and the Commander of NAVAIR of their rights *and obligations* to determine the appropriate use of the funds involved.

Rather than strictly construe the apportionment statute, the Federal Circuit defined "in excess of" to mean not just more than but also *after*. If that were the case, then an Executive Branch official could also obligate and expend moneys *before* they are even appropriated since doing so would not be "in excess" of an appropriation. That interpretation would squarely contradict this Court's holding in *Sutton v. United States*, 256 U.S. 575, wherein the Court held that the Secretary's authority was limited to the amount appropriated.

Recently, the Supreme Court has made very clear that the Anti-Deficiency Act is to be construed strictly. According to the Court, the meaning of the Act is plain: it prohibits the government "from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation." *Hercules*, 116 S. Ct. at 987. Given this Court's interpretation of section 1341(a) and that provision's language in common with section 1517, there is but one correct interpretation of section 1517: it prohibits the government "from entering into a contract for the future payment of money *in advance of* or in excess of, an existing [apportionment.]" *See id.* at 987 (emphasis added). The Court of Appeals ruling to the contrary cannot be reconciled with either the plain wording of the statute or the *Hercules* decision.

Similarly, 31 U.S.C. § 1512 expressly requires that appropriated funds be apportioned. This necessarily means that no use of funds -- even though appropriated -- may be made *before* apportionment -- an understanding of the law that is shared by the government. In implementing these statutory

requirements, the DOD Accounting Manual specifically states that funds must be apportioned before they may be obligated:

> An apportionment or reapportionment is a distribution made by OMB [Office of Management and Budget] of amounts available for obligation in an appropriation or fund account. Except in certain instances . . . *apportionments* and reapportionments by OMB *are required before funds may be obligated*.

App. 23a (emphasis added).[5/] The reason for this requirement is clear: OMB (as the delegee of the President) may decide to delay or otherwise alter an expected apportionment. And, if obligations are made before the apportionment, those obligations may, in fact, have no support in apportioned funds. By allowing the NAVAIR contracting officer to obligate funds before the President has apportioned them, the Court of Appeals would permit a subordinate agent to usurp the President's obligation to impound those funds and similarly would usurp the authority of those officials having allocation and commitment responsibilities. Clearly, this was not what the Congress intended when it designated the President, who in turn designated the Director of OMB, as the sole authority to apportion moneys. The same holds true for regulatory process implemented by the Department of Defense. After funds are allocated to the Secretary of Defense, regulations required then to be allotted, suballotted and committed down through the chain of command to the Contracting Officer. NCM ¶ 073002(2). App. 24f.

Consistent with that reasoning, the Navy's own regulations do require apportionment before obligation. The NCM imposes a

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[5/] DOD Directive 7200.1 similarly states that obligation authority is restricted to the amount that has been apportioned, and emphasizes that obligations are not authorized in excess of the amount apportioned. App. 7f, 13f-14f

sequential funding process whereby funds first are apportioned, then allocated to the Secretary of Defense, and then allotted, suballotted, and committed through the chain of command in the Navy. NCM ¶ 073002(2). App. 24f. Under this regime, a contracting officer may not obligate funds until *all* of the proper preceding steps in the sequential funding approval chain have been completed. The NCM expressly states the apportionment process "is the initial step in the budget execution phase." NCM ¶ 073100. App. 28f.

The Congressional Research Service has confirmed this requirement that funds must be apportioned before they are obligated:

> When full-year defense appropriations have been enacted, military agencies, installations, and activities *do not immediately have the authority to obligate* the Federal Government to spend money. The Anti-Deficiency Act (31 U.S.C. 1511 *et seq.*) requires that funds . . . be apportioned or distributed to the military departments. (Emphasis added.)

CRS, *Short-Term Continuing Resolutions: The Department Of Defense Experience*, at 8, 89-579F (Oct. 19, 1989).

Nonetheless, the Court of Appeals ruled that funds could be obligated before they are apportioned, notwithstanding the laws as written. When the Board of Contract Appeals declined to enforce the funding laws and regulations, it candidly admitted to a fear that holding the Navy responsible for a violation of the statutory and regulatory requirements would "wreak havoc" on the federal procurement process. App. 33b. Because of this erroneous and irrelevant perceived practical effect, the Board concluded that "it is unreasonable to read the apportionment statutes to require the Government to halt all contractual actions when OMB takes its statutorily allotted time to discharge its apportionment duties." *Id.* In short, the Board allowed perceived practical concerns to subvert Congress' requirement that the Executive Branch comply with the law before obligating funds. While the court did not

admit to such a fear, the reasoning provided evidences that it placed perceived practical considerations above the dictates of the law.

Neither the Board nor the court may bend or ignore the law because of potential implications of the outcome. *See Commissioner v. Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987). This Court made this point very clearly in its recent *Hercules* decision by giving the Act its literal meaning. This Court ruled that "the Act bars agreements for which there has been no appropriation," unless a statute expressly permitted an exception to the Anti-Deficiency Act. 116 S. Ct. at 988 n.10. Rather than applying the Act so as to give effect to Congress' intent, and to enforce Congress' constitutional power of the purse, the Court of Appeals ignored the Act and gave effect to the Navy's fears about the practical consequences of requiring the Navy to follow the law.

It is apparent that concern over the practical consequences of the decision affected the way the court chose to read the law. The court concluded funds may be obligated in advance of an approved apportionment even while it agreed that funds could not be obligated in excess of an approved apportionment. App. 24a-25a. This conclusion is inherently inconsistent. In the absence of an apportionment, the amount of apportioned funds is zero. At that point, any obligation would exceed the apportioned amount, and so would be illegal.

B. This Court's Precedent Hold That Contracts Executed In Violation Of The Law Cannot Be Enforced.

As was explained above, once funds have been apportioned, they must be allocated and committed before they can be obligated. Accordingly, the option exercise was ineffective because the contracting officer acted without authority when she purported to obligate funds in order to exercise the option: she usurped the authority of OMB to apportion funds, the authority of the Comptroller of the Navy to allocate funds, and the authority of the NAVAIR Comptroller to commit funds.

For over a hundred years the law has been that a contract in violation of the law is a nullity. In *Clark v. United States*, 95 U.S. 539 (1877), the owner of a vessel had entered into an oral contract under which the government would put the vessel to use to determine whether it would satisfy its needs, would pay a specified daily rate for use of the vessel and would be responsible for the vessel while in its possession. While in the government's possession, the vessel was destroyed. The owner sought recovery in the Court of Claims. This Court held that the oral contract violated the statutory requirement that all contracts be in writing, and that the oral contract was therefore not enforceable.

In this case, the contract was executed by the government in violation of federal funding laws. As such there can be no enforceable contract. Stated another way, the contracting officer had no authority to exercise the option because doing so was in violation of the apportionment statutes. It is a basic rule that any action taken by a government employee in absence of authority is a nullity. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). Accordingly, no valid contract was brought into existence when the contracting officer required Cessna to perform work based on the obligation of funds that had not been apportioned.

C. The Court Of Appeals Ruling On Standing Conflicts With The Law Of This Court And Other Circuit Courts Of Appeal.

The Court of Appeals dismissed Cessna's arguments that NAVAIR's actions were in violation of the Anti-Deficiency Act and Navy regulations implementing that Act. The court found no violation of the Act, which for the reasons explained above was erroneous, and ruled that any violations of the regulations implementing the Act were of no consequence because Cessna was not entitled to rely upon the Navy's compliance with these laws. Presumably, the court's reasoning would apply to violations of the Anti-Deficiency Act as well. In either case, to deny Cessna any relief, the Court of Appeals resurrected a rule of standing that was repudiated nearly thirty years ago.

The court's decision in this respect relies upon stale case law: *Rough Diamond Co. v. United States*, 351 F.2d 636 (Ct. Cl. 1965). *See* App. 26a. The court's 1965 decision in *Rough Diamond* expressly relied upon the Supreme Court's even earlier 1940 decision in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), as do ultimately all the other cases cited to by the Court of Appeals.[6/] By relying upon the *Perkins* line of cases, the Court of Appeals turned back the clock on the law of standing.

In *Perkins*, the Court ruled that a disappointed bidder had no legal right to complain about the government's violation of the Walsh-Healy Act, because the Act was for the "sole benefit" of the government, and any violation of the Act therefore conferred no legal rights on the contractor. 310 U.S. at 129. Two decisions issued in 1970 make it clear that *Perkins* no longer reflects the state of the law.

First, the D.C. Circuit decided *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), where the court held that a disappointed bidder has standing to challenge the legality of a contract award, regardless of the nature of the statute or regulation the government allegedly violated in conducting the procurement. Second, the Supreme Court soon thereafter explicitly restated the law on standing in *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970). In reversing the appeals court's reliance upon *Perkins*, the Court adopted the current standing test, and implicitly rejected the old test adopted in *Perkins*, by stating "the existence or non-existence of a 'legal

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6/ *Hartford Accident & Indemnity Co. v. United States*, 127 F. Supp. 565, 567 (Ct. Cl. 1955) (citing *Perkins*); *Applied Devices Corp. v. United States*, 591 F.2d 635, 640 (Ct. Cl. 1979) (citing *Rough Diamond*); *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317 (Ct. Cl. 1970) (citing *Hartford*); and *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995) (citing *Rough Diamond* and *Chris Berg*).

interest' is a matter quite distinct from the problem of standing." *Id.* at 153 n.1.

After *Camp*, many courts have recognized that the legal right test established by *Perkins* no longer applies, and by extension, the cases resting on *Perkins* no longer are good law. *See, e.g., B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 719 (2d Cir. 1983) ("[t]he Court in *Data Processing* repudiated the [*Perkins*] 'legal right' doctrine as a test of standing. . . ."); *Hayes Int'l Corp. v. McLucas*, 509 F.2d 247, 254-55 (5th Cir. 1975) ("While *Perkins* has not been expressly overruled by the Supreme Court, the 'legal interest' test for standing has largely been abandoned."). *See generally* Davis and Pierce, *Administrative Law Treatise* §§ 16.2-16.3 (1994). Recently, this court expressly held that standing was not dependent upon whether a statue was intended to benefit the plaintiff. *National Credit Union Admin.*, 118 S. Ct. at 1938.

By resurrecting the *Perkins* line of cases, the Federal Circuit brought back from the dead a standing rule which the decisions of other circuit courts of appeal *and* the Supreme Court indicate had been long gone. Confusing the matter further is the length to which the court went in ruling Cessna had standing to pursue its claim based upon the Anti-Deficiency Act. App. 13a-17a. But later, the court relies upon out of date standing cases to pull the rug from out under this ostensible holding on standing, by stating contractors do not have any legal interests protected by the Anti-Deficiency Act. Which is to say, contractors do not have standing to challenge Anti-Deficiency Act violations.

The Court of Appeals relies upon *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970) for the notion that an agency "always" can relax its rules when those rules are

not intended to benefit the public. App. 27a.[7/] But through inadvertence or otherwise, the Court of Appeals does not state the complete rule established by this Court. In particular, the appellate court does not address the exception relevant here, namely, that an agency may not violate its rules when this would cause "substantial prejudice to the complaining party." *American Farm Lines*, 397 U.S. at 539 (*quoting NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953). *See also Oy v. United States*, 61 F.3d 866, 875 (Fed. Cir. 1995). Cessna obviously was prejudiced in a very substantial way by the Navy's violations of the provisions at issue -- it was forced to continue contract performance at a substantial loss.

[7/] *American Farm Lines* involved rules obviously of a procedural nature, and were developed by the agency without any requirement to do so. Here, the Navy was dealing with substantive rules made applicable statute.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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May 28, 1998

APPENDIX

The CESSNA AIRCRAFT COMPANY, Appellant,

v.

John H. DALTON, Secretary of Navy, Appellee.

No. 96-1185.

United States Court of Appeals,
Federal Circuit.

Oct. 6, 1997.

Rehearing Denied; Suggestion for Rehearing In Banc Declined Feb. 27, 1998.

Contractor appealed from decision of the Armed Services Board of Contract Appeals, 1993 WL 89795, 1995 WL 575173, denying contractors' claims that Navy failed to exercise, in proper and timely manner, options under contract. The Court of Appeals, Schall, Circuit Judge, held that: (1) contractor's claim for additional compensation for work performed during three-year option period arose under Contract Disputes Act (CDA) and was within Board's jurisdiction; (2) Antideficiency Act did not prohibit funds from being obligated before they were both appropriated by Congress and apportioned by Executive Branch; (3) provision of Navy contract requiring Navy to exercise option to renew "not later than 1 October, 1988" permitted Navy to exercise option on that date; and (4) although Navy deviated from Cancellation of Items clause in drafting contract schedule that gave Navy until day after contract expired to exercise option to renew, without first obtaining proper authority to do so, contractor could not rely on deviation in arguing that Navy's exercise of options for two fiscal years were ineffective.

Affirmed.

[1] UNITED STATES k73(15)
393k73(15)

Conclusions of law of Armed Services Board of Contract Appeals are reviewed de novo; such legal conclusions include grants of summary judgment. Contract Disputes Act of 1978, § 10(b), 41 U.S.C.A. § 609(b).

[2] UNITED STATES k73(15)
393k73(15)

Decision of the Armed Services Board of Contract Appeals on finding of fact may not be set aside unless opponent can meet its burden establishing that finding is arbitrary, capricious, so erroneous as to necessarily imply bad faith, or not supported by substantial evidence. Contract Disputes Act of 1978, § 10(b), 41 U.S.C.A. § 609(b).

[3] UNITED STATES k73(9)
393k73(9)

Contractor's claim for additional compensation for work performed during three- year option period arose under Contract Disputes Act (CDA) and was within jurisdiction of Armed Services Board of Contract Appeals, although contractor argued that Navy violated Antideficiency Act and attendant regulations and sought compensation from Navy based upon theory of implied-in-fact contract for services rendered during option years. Contract Disputes Act of 1978, § 8(d), 41 U.S.C.A. § 607(d); 31 U.S.C.A. § 1341.

[4] UNITED STATES k62
393k62

Generally, Antideficiency Act prohibits government officials and employees from making expenditures or incurring obligations in excess of available appropriations or in advance of appropriations. 31 U.S.C.A. § 1341.

[4] UNITED STATES k82(1)
393k82(1)

Generally, Antideficiency Act prohibits government officials and employees from making expenditures or incurring obligations in excess of available appropriations or in advance of appropriations. 31 U.S.C.A. § 1341.

[5] UNITED STATES k79
393k79

As far as government contracts are concerned, Antideficiency Act bars federal employee or agency from entering into contract for future payment of money in advance of, or in excess of, existing appropriation. 31 U.S.C.A. § 1341.

[6] UNITED STATES k79
393k79

Antideficiency Act did not prohibit funds from being obligated before they were both appropriated by Congress and apportioned by Executive Branch. 31 U.S.C.A. §§ 1341, 1512, 1517.

[7] UNITED STATES k62
393k62

Contracting officer's exercise of option to renew Navy contract after funds were appropriated by Congress did not violate Antideficiency Act, even though funds were obligated

before they were apportioned by Executive Branch. 31 U.S.C.A. §§ 1341, 1512, 1517.

[8] UNITED STATES k70(35)
393k70(35)

Provision of Navy contract requiring Navy to exercise option to renew "not later than 1 October, 1988" permitted Navy to exercise option on that date, even though underlying contract expired on September 30; Navy's ability to exercise option was not tied to original performance period of the contract.

[9] UNITED STATES k70(35)
393k70(35)

Contractor was not compelled to perform voluntary services when Navy contract expired and Navy did not exercise option to renew until the next day; to the extent that contractor maintained personnel and equipment at site during period in question, it did not show that Navy either requested or compelled it to do so or that Navy accepted those services in violation of statute prohibiting voluntary services. 31 U.S.C.A. § 1342.

[10] UNITED STATES k70(35)
393k70(35)

Although Navy deviated from Cancellation of Items clause in drafting contract schedule that gave Navy until day after contract expired to exercise option to renew, without first obtaining proper authority to do so, contractor could not rely on deviation in arguing that Navy's exercise of options running for two fiscal years were ineffective, since Cancellation of Items clause was primarily for benefit of government. 48 C.F.R. § 17.109(a).

***1443** Herbert L. Fenster, McKenna & Cuneo, L.L.P., Denver, CO, argued for appellant. With him on brief were Michael T. Janik and David Kasanow, Washington, DC.

Geoffrey C. Cook, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, argued for appellee. With him on brief were Frank W. Hunger, Assistant Attorney General, and David M. Cohen, Director.

Before LOURIE, CLEVENGER, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

The Cessna Aircraft Company ("Cessna") appeals from March 12, 1993 decision of ***1444** Armed Services Board of Contract Appeals ("Board") on cross-motions for partial summary judgment in Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912, 1993 WL 89795 (Mar. 12, 1993) (Cessna I). Cessna also appeals from Board's September 21, 1995 decision following a hearing in same case, 96-1 BCA ¶ 27,966, 1995 WL 575173 (Sept. 21, 1995) (Cessna II). In those decisions, Board denied Cessna's claims that Naval Air Systems Command of United States Navy ("Navy" or "NAVAIR") failed to exercise, in a proper and timely manner, certain options under a contract between Cessna and Navy. We affirm.

BACKGROUND
I.

This appeal arises out of Contract No. N00019-83-C-0090, awarded to Cessna by Navy, under which Cessna was required to provide training, and related technical and maintenance support, for undergraduate naval

flight officers at U.S. Naval Air Station in Pensacola, Florida. See Cessna I, 93-3 BCA at 128,876. [FN1]

FN1. We addressed other claims that Cessna made arising out of the same contract in Dalton v. Cessna Aircraft Co., 98 F.3d 1298 (Fed.Cir.1996).

The contract called for Cessna to provide flight training services during five program years, commencing August 1, 1984, and ending September 30, 1988. Cessna I, 93-3 BCA at 128,876. Each program year ended on last day of government's fiscal year, September 30. Id. In addition, contract contained an option provision allowing Navy to extend contract performance for three additional years. Id. Section H-6 of contract Schedule, entitled "Exercise of Option," established conditions on Navy's exercise of option. Section H-6 provided as follows:

> Pursuant to "Option to Extend Services" clause, option for three years will be exercised, if at all, in writing by a unilateral modification to this contract issued by Contracting Officer, Naval Air Systems Command, not later than 1 October 1988.

Id. Each option year ran from October 1 to September 30; that is, first option year ran from October 1, 1988 to September 30, 1989, second option year ran from October 1, 1989 to September 30, 1990, and third option year ran from October 1, 1990 to September 30, 1991. Cessna I, 93-3 BCA at 128,876. The Navy had to notify contractor of availability of funds for second and third option years.

The timing of this notification was addressed by section H-8 of contract Schedule, entitled "Multiyear Procurement," which stated that:

If three year option is exercised, date within which contracting officer

> ... will notify Contractor of availability of funds sufficient for performance of requirements for the Second Option Year (Fiscal Year 1990) is 1 October 1989. Third Option Year (Fiscal Year 1991) is 1 October 1990.

Id. at 128,877. The contract further incorporated by reference, inter alia, two Defense Acquisition Regulation ("DAR") provisions concerning multiyear aspects of contract. The first, named "Cancellation of Items" clause, addressed cancellation of contract based on a lack of availability of funds. This clause stated in pertinent part:

(b) As used herein, term "cancellation" means that Government is canceling, pursuant to this clause, its requirements for items as set forth in Schedule for all fiscal years (1 October - 30 September) subsequent to that in which notice of cancellation is provided. Such cancellation shall occur only if Contracting Officer (i) notifies Contractor that funds will not be available for contract performance for next succeeding fiscal year and any subsequent fiscal year; or (ii) fails to notify Contractor prior to beginning of next succeeding fiscal year that funds have been made available for performance in succeeding fiscal year.

DAR § 7-1903.33(d). [FN2] A related clause addressed contract execution once funds became available. It stated in pertinent part that:

FN2. The DAR has since been replaced by the Federal Acquisition Regulation ("FAR"). The analogous FAR provision is 48 C.F.R. § 52.217- 2 (1996).

Upon availability to Contracting Officer of funds for performance of requirements in ***1445** next succeeding fiscal year, Contracting Officer shall notify Contractor in writing of amount of funds available for contract performance in next succeeding fiscal year and contract shall be modified accordingly.

DAR § 7-1903.33(c). [FN3]

FN3. No FAR provision analogous to section 7-1903.33(c) currently exists.

The contract was awarded on May 10, 1983. Sometime in either late March or early April of 1988, during final program year of original five-year term of contract, Cessna contacted contracting officer ("CO") to inquire about whether Navy intended to exercise three year option. Cessna II, 96-1 BCA at 139,686. In response, by letter dated April 18, 1988, CO informed Cessna that Navy did intend to exercise option, stating that:

> 1. You are hereby notified of our intent to exercise option for three option years under Contract N00019-83-C-0090. Pursuant to Special Provision H-6, "Exercise of Option," we will exercise option for three option years, if at all, not later than 1 October 1988.

Id.

On August 3, 1988, during negotiation meetings concerning unrelated claim for equitable adjustment made by Cessna, Cessna again raised issue of when Navy intended to exereise option. Id. At that time, Cessna expressed its view that option had to be exercised before October 1, 1988. Id. On September 26, 1988, in a telephone conversation between

CO and a Cessna official, CO asked whether, because October 1, 1988 was a Saturday, it would be acceptable for option to be exercised on October 3, 1988. Cessna II, 96-1 BCA at 139,687. The Cessna official responded that October 3 would be a problem and that Cessna needed to receive exercised option on October 1. Id. CO informed Cessna official at that time that she would exercise option via facsimile on October 1. Id.

During period September 27-30, 1988, in midst of further negotiations regarding Cessna's equitable adjustment claim, Cessna reiterated its view that Navy had to exercise option by September 30, 1988, while the Navy contended that it had until October 1. Id. As of September 30, 1988, the Department of Defense Appropriation Act, 1989, Pub.L. No. 100-463, 102 Stat. 2270 (1988), from which the contract at issue would be funded, had been passed by Congress but had not yet been signed by the President. Cessna II, 96-1 BCA at 139,687. On September 30, the CO informed Cessna that the option would be faxed on October 1. Id. at 139,688. Anticipating the passage of the appropriation act, on September 30, 1988, a NAVAIR budget analyst executed a "Financial Accounting Data Sheet"--used to make funds available for obligation--with the proviso "EXECUTION OF THIS DOCUMENT IS CONTINGENT ON CONGRESSIONAL PASSAGE OF THE FY89 APPROPRIATION ACT OR OTHER AUTHORITY." Id. at 139,687-88.

On October 1, 1988, after receiving word from a NAVAIR division director that the President had signed the appropriation act, the CO executed the necessary contract modification, deleted the proviso from the Financial Accounting Data Sheet, and faxed the modification and data sheet to Cessna. Id. at 139,688. Cessna personnel found the

faxed version of the modification and data sheet on Monday, October 3, 1988. Cessna II, 96-1 BCA at 139,689.

By letter dated October 7, 1988, Cessna took the position that the purported modification was ineffective. Id. The letter further stated that Cessna would continue to provide services and would submit a proposal for continuation of the work. Id. at 139,689-90. On December 5, 1988, Cessna submitted a proposal to the Navy for providing services for the three option years. Id. at 139,690. In its letter, Cessna stated that it was proceeding under the assumption that its services would soon be embodied in a definitive contract. By letter dated December 7, 1988, the CO responded that the option was exercised properly on October 1, 1988, and instructed Cessna to continue performance in accordance with the contract as modified by the option. Cessna II, 96-1 BCA at 139,690. Cessna provided services throughout the three year option period. Similar to the first option year, for the second and third option years, pursuant to section H-8 of the contract, the Navy transmitted the appropriate ***1446** modifications on October 1, 1989, and October 1, 1990, respectively.

II.

In April of 1991, Cessna submitted a certified claim to the CO, as revised in June of 1991, seeking approximately $25.7 million as additional compensation for work performed during the three year option period. The CO neither issued a final decision nor informed Cessna when such decision would be issued within the sixty day time limit of Section 6(c) of the Contract Disputes Act ("CDA"), 41 U.S.C. § 605(c). [FN4] Cessna appealed this deemed denial to the Board. [FN5]

FN4. Section 605(c)(2) provides that "[a] contracting officer shall, within sixty days of receipt of a submitted certified claim over $100,000-- (A) issue a decision; or (B) notify the contractor of the time within which a decision will be issued." 41 U.S.C. § 605(c)(2) (1994).

FN5. Section 605(c)(5) of the CDA provides in pertinent part that "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter." 41 U.S.C. § 605(c)(5) (1994).

Before the Board, Cessna argued, inter alia, that: (i) the CO violated the Antideficiency Act and attendant regulations by obligating funds for the first and third years of the three-year option period prior to apportionment and allocation of the funds (Counts I and XIII); (ii) the CO's actions in deleting the proviso on the Financial Accounting Data Sheet rendered the option exercise ineffective (Count III); (iii) the Navy failed to exercise the option, in a timely manner, such that the contract was canceled (Count V); (iv) by exercising the option on October 1, 1988, the Navy required Cessna to provide voluntary services in violation of the Antideficiency Act (Count VI); and (v) the second and third option years were canceled because the CO did not issue a notice of funds availability prior to the beginning of the succeeding fiscal year (Counts VIII and XI). [FN6] Cessna I, 93-3 BCA at 128,880-81. In Count XIV, Cessna sought to recover compensation for services rendered during the option years based upon a theory of implied-in-fact contract. Cessna II, 96-1 BCA at 139,683.

FN6. While Cessna made other claims before the Board, those claims are not relevant to the present appeal and are not discussed in this opinion.

In due course, the parties filed cross-motions for summary judgment with respect to Counts I, III, VIII, XI, and XIII. The Board granted the Navy's motion for summary judgment as to Counts I, III, and XIII, and denied summary judgment to both sides on Counts VIII and XI. Cessna I, 93-3 BCA at 128,911. After a hearing on the merits, the Board issued a decision denying Cessna relief on Counts V, VI, VIII, and XI. See Cessna II, 96-1 BCA at 139,683, 139,701. In sum, the Board denied Cessna relief as to all of its claims pertinent to its appeal. This appeal followed.

DISCUSSION
I.

Pursuant to the CDA, 41 U.S.C. §§ 601-613 (1994), we review decisions of the Board under the following standard:

> the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

41 U.S.C. § 609(b).

[1] The Board's conclusions of law are reviewed de novo. See Ingalls Shipbuilding, Inc. v. Dalton, 119 F.3d 972, 975 (Fed.Cir.1997). Such legal conclusions include grants of

summary judgment. See Confederated Tribes of Colville Reservation v. United States, 964 F.2d 1102, 1107 (Fed.Cir.1992) (noting that the grant of summary judgment is a legal conclusion).

[2] The Board's decision on a finding of fact may not be set aside unless the appellant can meet its burden of establishing that the finding is arbitrary, capricious, so erroneous as to necessarily imply bad faith, or not supported by substantial evidence. Erickson Air Crane Co. v. United States, 731 F.2d 810, 814 (Fed.Cir.1984); see William F. Klingensmith, Inc. v. United States, 731 F.2d 805, *1447 809 (Fed.Cir.1984); J.M.T. Mach. Co. v. United States, 826 F.2d 1042, 1046 (Fed.Cir.1987). On appeal, Cessna makes the following contentions: (i) the Board erred in sustaining the Navy's actions in obligating funds in advance of carrying out the apportionment process (Counts I and XIII); (ii) the Board incorrectly concluded that the option was properly exercised even though the CO deleted the proviso on the Financial Accounting Data Sheet (Count III); (iii) the Board erroneously determined that the option was timely exercised (Count V); (iv) the Board erred in concluding that the Navy did not require Cessna to perform voluntary services (Count VI); and (v) the Board incorrectly refused to give precedence to the Cancellation of Items clause and therefore erred in concluding that the second and third option years of the contract were not canceled (Counts VIII and XI). For the reasons set forth below, we reject Cessna's arguments.

II.

[3] Before reaching the merits of the appeal, we must address a preliminary issue raised by the Navy. Before the Board, the Navy argued that Cessna lacked standing to contest matters relating to the Navy's compliance with

funding statutes. The Board rejected this challenge to its jurisdiction. The Board noted that under the CDA, it had jurisdiction "to decide any appeal from a decision of a contracting officer ... relative to a contract made by its agency." Cessna I, 93-3 BCA at 128,881 (citing 41 U.S.C. § 607(d)). The Board concluded that Cessna's appeal related to its contract with the Navy and that therefore Cessna's standing to bring the appeal and the Board's jurisdiction to decide it were "grounded in the provisions of the CDA." Id.

As it did before the Board, the Navy argues that the Antideficiency Act does not provide Cessna with a private right of action. Thus, it asserts that Cessna's appeal from the Board's decision regarding Counts I, III, VI, and XIII should be dismissed because those counts involve claims relating to the government's funding of its contractual obligations, and no private right of action exists under the Antideficiency Act with respect to such matters. Quoting from Hagan v. United States, 229 Ct.Cl. 423, 671 F.2d 1302 (1982), the Navy argues that the Antideficiency Act "sets forth its own discipline and penalties, and does not rely on private enforcement through Tucker Act litigation." Id., 671 F.2d at 1305. We disagree.

As the Board noted, pursuant to 41 U.S.C. § 607(d), it has jurisdiction "to decide any appeal from a decision of a contracting officer ... relative to a contract made by its agency." Cessna I, 93-3 BCA at 128,881. Section 607(d) further provides that, "[i]n exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims."

Like the Board, we view Cessna's claims as "grounded in the CDA." Cessna's contract with the Navy was governed by the CDA, and it was under the CDA that Cessna submitted its

claim to the contracting officer for additional compensation for work performed during the three year option period. The fact that Cessna argues that the Navy violated the Antideficiency Act and attendant regulations and the fact that Cessna seeks compensation from the Navy based upon a theory of implied-in-fact contract for services rendered during the option years do not mean that Cessna is seeking relief under the Antideficiency Act.

In Gould, Inc. v. United States, 935 F.2d 1271 (Fed.Cir.1991), Gould, Inc. ("Gould") was awarded a five-year contract by the Navy to build tactical radios. Id. at 1272. During contract performance, Gould encountered unanticipated difficulty in designing a radio that met the contract's performance requirements. Id. As a result, it submitted a claim to the contracting officer seeking to recover the costs it allegedly incurred in achieving adequate design. Id. Gould based its theory of recovery in part on the contention that the government had violated 10 U.S.C. § 2306(h)(1), by failing to supply a "stable design" for a multiyear procurement. According to Gould, this meant that the contract was illegal from its inception. Gould, 935 F.2d at 1272. After the contracting officer denied the claim, Gould appealed to the United States Claims Court. [FN7] In due course, ***1448** the court granted the government's motion to dismiss under Rule 12(b)(4) of the court, for failure to state a claim upon which relief could be granted. Id. at 1273. On appeal by Gould, we vacated the dismissal and remanded the case for further proceedings. Id. at 1276. In so doing, we held that Gould's complaint contained sufficient facts to state a claim upon which relief could be granted. Id. at 1275-76.

FN7. The Claims Court was renamed the Court of Federal Claims pursuant to § 902 of the Federal Courts

Administration Act of 1992, Pub.L. No. 102- 572, 106 Stat. 4506, 4516 (1992), effective October 29, 1992.

Upon remand, the government filed a motion to dismiss for lack of jurisdiction. The Court of Federal Claims granted the motion. The court read Gould's complaint as based solely on a contract with the United States but at the same time as alleging that there was no "stable design" and that the contract was illegal. Under these circumstances, the court reasoned, the only possible basis for contract jurisdiction was a contract implied in law, but such a contract was not within the court's jurisdiction. Gould, Inc. v. United States, 29 Fed. Cl. 758, 761 (1993). Again, Gould appealed.

On appeal, we held that the trial court had erred in dismissing Gould's complaint for lack of jurisdiction. Gould, Inc. v. United States, 67 F.3d 925 (Fed.Cir.1995). Noting that Gould relied on its underlying contract with the Navy as a basis for jurisdiction in the Court of Federal Claims, we stated that "there is no question that Gould's complaint alleges the existence of express contract, albeit one entered into allegedly in violation of 10 U.S.C. § 2306(h)(1)(D)." Id. at 929. We concluded: "This is sufficient ... to confer jurisdiction in the Court of Federal Claims." Id. We also concluded: "[E]ven if Gould's allegations of express contract are insufficient, Gould's amended complaint, when viewed in a light most favorable to Gould, alleges the existence of implied-in-fact contract--a separate basis for jurisdiction in the Court of Federal Claims." Id. at 930. Accordingly, we again vacated the trial court's decision and remanded the case for further proceedings.

Similarly, in this case, Cessna argues that the Navy's actions in exercising the option in 1988 violated the Antideficiency Act, thereby rendering the option exercise inoperative and canceling the contract. However, Cessna

contends, because it supplied services that the Navy accepted and from which the Navy benefited, after all legal requirements had been met (because the appropriations process had been completed), it is entitled to recover under implied-in-fact contracts for each of fiscal years 1989, 1990, and 1991. Under these circumstances, Cessna has put forth a cognizable claim for relief. See American Telephone and Telegraph Co. v. United States, 124 F.3d 1471, 1479 (Fed.Cir.1997) ("An implied-in-fact contract arises when, in the absence of express contract, the parties' behavior leaves no doubt that what was intended was a contractual relationship permitted by law."). Cessna's claims in Counts I, III, VI, and XIII were properly before the Board. [FN8]

FN8. The Navy's reliance on Hagan is misplaced. In that case, the plaintiff, Richard Hagan, sought monetary recovery for services provided while serving on a grievance panel. Hagan, 671 F.2d at 1304. Hagan alleged that the government violated the prohibition against its acceptance of voluntary services under 31 U.S.C. § 665(b)--the predecessor to present 31 U.S.C. § 1342--which made it illegal for him to sit on the grievance panel. Id. at 1305. The United States Court of Claims noted that there was no express contract, and it also rejected any theory of implied-in-fact contract because there plainly was no consensual agreement between Hagan and the government for Hagan's services. Id. at 1304. By contrast, in this case, Cessna made a nonfrivolous allegation that the government violated a statute, thus rendering the contract void, and that the services Cessna provided during the option years were done so under a consensual agreement with the government, thereby giving rise to implied- in-fact contract.

Having concluded that Cessna's claims on appeal with respect to Counts I, III, VI, and XIII are properly before us, we turn to the merits.

III

A.

By way of background, the Anti-deficiency Act finds its origins in a statute enacted in 1870, known as the Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. The statute addressed the problem that Executive Branch officials were obligating funds before they were appropriated by Congress, and then making deficiency requests for appropriations ***1449** that Congress had little choice in deciding because government agencies had basically committed the United States to make good on its promises. See, e.g., 59 Comp. Gen. 369, 372 (1980).

[4][5] The present version of the Act, found at 31 U.S.C. § 1341 (1994), [FN9] provides in pertinent part as follows:

> FN9. While the central provision of the Act is found at 31 U.S.C. § 1341, other provisions have been passed to supplement this provision, including 31 U.S.C. §§ 1342, 1501-1519 (1994).

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not -

(A) make or authorize expenditure or obligation exceeding amount available in appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before appropriation is made unless authorized by law.

Generally, the Act prohibits government officials and employees from making expenditures or incurring obligations in excess of available appropriations or in advance of appropriations. See Blackhawk Heating & Plumbing Co. v. United States, 224 Ct.Cl. 111, 622 F.2d 539, 542 n. 4 (1980). As far as government contracts are concerned, the Act "bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, existing appropriation." Hercules Inc. v. United States, 516 U.S. 417, ----, 116 S.Ct. 981, 987, 134 L.Ed.2d 47 (1996).

By its terms, the Antideficiency Act restricts the ability of the government to enter into multi-year contracts because funds generally cannot be obligated beyond the current fiscal year. This led to problems in the area of military procurement, as described in the following passage from a Senate Report:

Some services and supplies now being procured with appropriations available for only 1 year require substantial investment by the contractor for equipment having a useful life longer than 1 year, or extensive investment in the hiring and training of personnel. These contracts are for such activities as base maintenance, aircraft and equipment overhaul, vehicle repair, and pilot training. If the contractor can obtain only a 1-year contract, his quoted price must cover all these expenses or he runs the risk of never recovering his unamortized investment if he loses the contract for the ensuing year or years. In such circumstances, however, a successful contractor is in a position to underbid competitors in later years since the competitors must include in their bid

prices the same initial investment costs that the contractor confronted. As a result, competition is reduced and the Government can be overcharged in later years.

S. Rep. No. 90-1313, at 1-2 (1968), reprinted in 1968 U.S.C.C.A.N. 2480, 2480-81.

To address these concerns, 10 U.S.C. § 2306(g) was enacted; it permits the government to enter into specified types of military procurement contracts having performance periods of up to five years, with option to extend performance by a period not exceeding three additional years. [FN10] If funds are not in fact appropriated in a subsequent ***1450** fiscal year, section 2306(g)(3) provides that the "contract shall be canceled or terminated."

FN10. Section 2306(g) provides in relevant part:

(g)(1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated -

....

(C) specialized training necessitating high quality instructor skills (for example, pilot and other aircrew members; foreign language training);

....

whenever he finds that -

(i) there will be a continuing requirement for the services consonant with current plans for the proposed contract period;

(ii) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

(iii) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.

(2) In entering into such contracts, the head of the agency shall be guided by the following principles:

....

(B) Consideration shall be given to the desirability of obtaining an option to renew the contract for a reasonable period not to exceed three years, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.

B.

[6] Cessna's first contention is that the Antideficiency Act, in combination with its implementing regulations and certain other funding statutes, prohibits funds from being obligated before they have been both appropriated by the Congress and apportioned by the Executive Branch. [FN11] Cessna argues that 31 U.S.C. § 1512, which requires that appropriated funds be apportioned, [FN12] and 31 U.S.C. § 1517, which prohibits government officials or employees from authorizing obligations that exceed apportionment,

[FN13] prevent the obligation of funds, even if appropriated, before they have been apportioned. As a general matter, Cessna maintains that permitting funds to be obligated in advance of apportionments is inconsistent with prohibiting funds from being obligated in excess of apportionments. If no apportionment has been made, Cessna contends, any obligation necessarily exceeds the approved apportionment (of zero).

FN11. Cessna further contends that the funds must be allocated, allotted, and suballotted to the subagency level, and that the agency must commit the funds to a contract, before funds can be obligated to a contract.

FN12. Section 1512(a) provides:

(a)Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.

FN13. Section 1517(a) provides that "[a]n officer or employee of the United States Government ... may not make or authorize an expenditure or obligation exceeding--(1) an apportionment."

As further support for its position, Cessna points to the Department of Defense ("DOD") Accounting Manual, page 22-6, paragraph 4a, which states that:

> An apportionment or reapportionment is a distribution made by OMB [Office of Management and Budget] of amounts available for obligation in appropriation or fund account. Except in certain instances, ... apportionments and reapportionments by OMB are required before funds may be obligated.

(emphasis added). In addition, Cessna cites to the Navy Comptroller Manual ("NCM"), paragraphs 073002(2) and 073100, [FN14] as establishing ***1451** a particular funding process wherein the first step is to apportion funds, after which they are allocated to the Secretary of Defense, and then allotted, suballotted, and committed to the Navy. Cessna asserts that because the CO attempted, on October 1, 1988, to exercise the option and to obligate funds before they had been apportioned, she acted without authority and the option exercise therefore was ineffective.

FN14. Paragraph 073002(2) states that:

On the basis of the enacted Department of the Navy appropriations, the Treasury Department prepares appropriation warrants which, after being countersigned by the General Accounting Office, are forwarded to the Department of the Navy as certification that the specific amounts are available for obligation and expenditure. Fund availability is established through compliance with procedures for submission, review, and Office of Secretary of Defense (OSD)/Office of Management and Budget (OMB) approval of apportionments and/or financial plans. In

conjunction with the apportionment procedure, the Office of the Assistant Secretary of Defense (Comptroller) establishes the authorized level of obligation and expenditure for each appropriation, as well as any controls or limitations required below the appropriation level, as a means of requiring compliance with the terms of approved programs and budgets. In passing obligational authority (as an allocation or as a limitation within operating budget authority) to other echelons of command, the Comptroller creates administrative subdivisions of appropriated funds with clearly defined responsibility for 31 U.S.Code 1517 violations, i.e., for the creation of any obligation or making of any expenditure in excess of an apportionment or reapportionment, or of an amount specified in an administrative subdivision thereof. The process of distributing financial authority is continued through the chain of command in the form of suballocations, allotments, operating budgets, or operating targets. Allotments, as well as the specified obligational authority within operating budgets, constitute administrative subdivisions of appropriated funds, subject to the sanctions of the Anti-Deficiency Act (31 U.S.Code 1518 and 1519) for the holders of allotments or operating budgets. Operating targets (e.g., those established for individual ships by type commanders) are administrative limitations of funds for which the legal responsibility is retained by the grantor. Paragraph 073100 states, in pertinent part, that "[t]he action required to obtain release of appropriated funds by means of the apportionment process is the initial step in the budget execution phase."

We reject Cessna's arguments. As noted above, 31 U.S.C. § 1341(a) prohibits the government from making expenditures or incurring obligations before funds have been appropriated. However, as for the apportionment process, addressed by 31 U.S.C. §§ 1511-1519, no such timing

limitation exists. For example, section 1512 merely requires appropriations to be apportioned to prevent obligations at rates that could result in the need for a deficiency or supplemental appropriation. Section 1513 provides a time table for carrying out the apportionment process, but is silent on the issue of whether the apportionment process must be carried out before obligations can be incurred. For its part, section 1517 prohibits government officials or employees from authorizing obligations that exceed apportionments, but says nothing about incurring obligations prior to carrying out the apportionment process. In sum, the relevant statutory provisions do not prohibit government agencies from incurring contractual obligations before completing the apportionment process. The remaining sections pertaining to apportionments are similarly silent.

This same reasoning applies to paragraphs 073002(2) and 073100 of the NCM; these paragraphs say nothing about the timing of incurring obligations versus carrying out the apportionment process. Therefore, they are of no assistance to Cessna. In addition, we note that paragraph 022064 of the NCM, entitled "Availability of Funds Prior to Apportionment," contemplates the possibility of incurring obligations before apportionment. It states:

> After the beginning of the fiscal year and prior to the specific allocation of funds pursuant to apportionment to the head of the responsible office ... the head of the responsible office is authorized by the Comptroller of the Navy to suballocate funds and to issue allotments under any appropriation act of such fiscal year in such amounts as will not exceed the amount contained in the appropriation warrant or the

> request for apportionment and allocation submitted to the Comptroller of the Navy.... Upon issuance of the approved budget activity allocations pursuant to apportionment, the limitations of such allocations will apply to all suballocation and allotment action taken prior to the receipt of such budget activity allocations.

The provision permits allotments and suballotments to be issued before apportionment, with restrictions as to their amounts. It would logically follow that obligations may also be incurred, with the same amount restrictions.

Finally, we turn to the DOD Accounting Manual, paragraph 4a, page 22-6 ("paragraph 4a"). Initially, we assume, without deciding here, that this provision could be properly considered a regulation. We must still determine whether the provision is a binding regulation, whose breach a contractor may assert against the government. The primary intent of a statute or regulation must be to protect or benefit a class of persons in order for that class to be able to bring suit against the government for violating the statute or regulation. See generally Rough Diamond Co. v. United States, 173 Ct.Cl. 15, 351 F.2d 636, 640, 642 (1965). We have stated that "if government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor's protection, the contractor is not bound by estoppel, acquiescence, or failure to protest." LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1552 (Fed.Cir.1995) (citing Chris Berg, Inc. v. United States, 192 Ct.Cl. 176, 426 F.2d 314, 317 (1970) and Rough Diamond, 351 F.2d at 639-43); see Applied Devices Corp. v. United States, 219 Ct.Cl. 109, 591 F.2d 635, 640-41 (1979). However, if the primary intended beneficiary of a statute or regulation is the

government, then a private party cannot complain about the government's failure to comply with that statute or ***1452** regulation, even if that party derives some incidental benefit from compliance with it. See Rough Diamond, 351 F.2d at 642; Hartford Accident & Indemnity Co. v. United States, 130 Ct.Cl. 490, 127 F.Supp. 565, 567 (1955).

In this case, paragraph 4a is primarily intended to benefit the government, not contractors such as Cessna. The provision is best described as internal operating provision for the management of funds within the agency. In Blackhawk Heating & Plumbing Co. v. United States, 224 Ct.Cl. 111, 622 F.2d 539 (1980), the Court of Claims rejected the argument that the Antideficiency Act places restrictions not only on the amount being appropriated, but also on the administrative divisions made with respect to the appropriations. Id., 622 F.2d at 552 n. 9. The court stated that such administrative barriers "are purely of in-house accounting nature and, as such are irrelevant to any determination respecting the availability of appropriated funds." Id. Paragraph 4a encourages Navy officials to follow particular administrative procedures to ensure that obligated funds are properly accounted for, thereby preventing officials from obligating more funds than have been appropriated.

We also find instructive the Supreme Court's reasoning in American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970). In that case, the Interstate Commerce Commission ("ICC") had promulgated rules pertaining to processing applications for granting motor carriers temporary operating authority. Id. at 534, 90 S.Ct. at 1290. One of those rules required applicant for such authority to submit with its application a supporting statement containing certain specified information. Id. In the application of one motor carrier, the supporting statement

accompanying the application failed to contain some of the required information. Id. at 537, 90 S.Ct. at 1292. In due course, despite the application's deficiencies, the ICC granted the motor carrier temporary operating authority. American Farm Lines, 397 U.S. at 536, 90 S.Ct. at 1291. This grant was challenged by other motor carriers on the ground that the ICC failed to "require strict compliance with its own rules." Id. at 537, 90 S.Ct. at 1291. In upholding the ICC's decision, the Court noted that the rules in question were not intended to confer important procedural benefits on individuals in the face of unfettered agency discretion. Id. at 538-39, 90 S.Ct. at 1292. Therefore, the Court stated, there was no reason to depart from the general principle that " '[i]t is always within the discretion of ... administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.' " Id. at 539, 90 S.Ct. at 1292 (quoting NLRB v. Monsanto Chem. Co., 205 F.2d 763, 764 (8th Cir.1953)); see also Contel Page Servs., Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,736, 1986 WL 20366 (1986) (finding that a FAR regulation requiring the CO to determine that funds were available before exercising option related to internal procedures and did not create any rights in the contractor, and therefore the CO's failure to make the determination would not render the exercise of the option ineffective). Paragraph 4a represents such internal procedural rule. Cessna may not rely on this provision as evidence that the government violated the Antideficiency Act in obligating funds before they were apportioned.

[7] Thus, we hold that the CO's exercise of the option did not violate the Antideficiency Act even though funds were obligated before they were apportioned. [FN15]

FN15. As noted, Cessna also contends that the option exercise was deemed ineffective because the CO acted without authority in deleting the proviso on the Financial Accounting Data Sheet and then exercising the option. Cessna's contention is without merit. The proviso provided that execution of the data sheet was conditioned upon the passage of the relevant appropriation act. This condition was automatically satisfied when the President signed the appropriation act. Therefore, in substance, the condition had been satisfied, and it made no difference whether or not the CO deleted the proviso before executing the data sheet.

C.

[8] Cessna next contends that section H-6--the option clause that required the Navy to exercise the option "not later than 1 October 1988"--must be interpreted to have required the Navy to exercise the option by September 30, 1988, which the Navy failed to ***1453** do. First, Cessna argues that because funding for the original contract term expired at midnight on September 30, 1988, the contract ceased to exist at that point and "[o]nce the contract ceased to exist, the option ceased to exist." Therefore, the deadline for proper exercise of the option had to be September 30, 1988. Second, Cessna contends that permitting the Navy to exercise the option on October 1, 1988, would yield illegal result. Cessna states that the Navy forced it to provide services between midnight on September 30, 1988, when funding ceased under the original contract, and the evening of October 1, 1988, when the option was purportedly exercised. Requiring Cessna to perform services in the absence of a contractual obligation would violate the prohibition against voluntary services set forth in 31 U.S.C. § 1342. [FN16] In this case, Cessna contends, such services included providing the support needed in order to fly aircraft and operate flight

simulators, retaining personnel at the site, and performing maintenance services to maintain aircraft, radar, simulators, spare parts, etc. Cessna states that in order to sustain the validity of the contract, the option clause should be interpreted to have required the Navy to exercise the option by September 30, 1988.

FN16. Section 1342 provides in pertinent part that "[a]n officer or employee of the United States Government ... may not accept voluntary services for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342 (1994).

We disagree. First, the option clause states that the Navy had to exercise the option "not later than 1 October 1988." We give effect to a plain reading of the clause, which is that the Navy had up until and including October 1, 1988, to exercise the option. See McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1435 (Fed.Cir.1996); Triax-Pacific v. Stone, 958 F.2d 351, 354 (Fed.Cir.1992). Furthermore, the option did not cease to exist just because the original term of performance under the contract expired at midnight on September 30, 1988. Rather, the option remained viable until October 1, 1988, on which date it was exercised by the Navy. The Navy's ability to exercise the option was not tied to the original performance period of the contract.

[9] Neither was Cessna compelled to perform voluntary services between midnight on September 30 and the evening of October 1, 1988. The Board made a finding of fact that "there is no evidence that the Navy proposed, directed or encouraged Cessna to incur rental and subcontractor costs." Cessna II, 96-1 BCA at 139,699. Cessna has not shown that the finding is unsupported by substantial evidence. See Koppers Co. v. United States, 186 Ct.Cl. 142, 405 F.2d 554,

557-58 (1968). Moreover, to the extent that Cessna may have maintained personnel and equipment at the site during the period in question, it has not shown either that the Navy requested or compelled it to do so or that the Navy accepted those services in violation of section 1342. Rather, Cessna itself chose to perform these services in anticipation that the Navy might exercise the option on October 1, 1988. Not having accepted the services, the government is not responsible for subsidizing them. [FN17]

FN17. Cessna further argues that even if the Navy had until October 1, 1988, to exercise the option, Cessna did not receive notice of the option exercise until October 3, 1988, rendering the option exercise untimely. In that regard, Cessna challenges the Board's finding of fact that Cessna and the CO reached an agreement that sending the option modification by facsimile would be acceptable, and Cessna also challenges the Board's reliance on the Navy's statement to Cessna personnel on September 30 to wait by their facsimile machines on October 1 to receive the option exercise. See Cessna II, 96-1 BCA at 139,698.

We disagree. A Cessna official acknowledged that the parties had an established practice of faxing modifications. Cessna II, 96-1 BCA at 139,688. Therefore, notice was effective upon receipt of the facsimile at Cessna's office on October 1, even though Cessna personnel chose not to be in the office at that time to receive the facsimile. See id. at 139,689. Furthermore, to the extent that Cessna's arguments are directed to witness credibility determinations of the Board, we find no compelling reason to alter those determinations. In that regard, we have stated that credibility determinations are "virtually unreviewable." Statistica, Inc. v. Christopher, 102 F.3d 1577, 1583 (Fed.Cir.1996).

D.

[10] Cessna's final argument is that the Navy's exercise of the second and third option ***1454** years, on October 1, 1989, and October 1, 1990, respectively, were ineffective. Cessna contends that the Cancellation of Items clause of the contract conflicts with section H-8 of the contract Schedule because the former clause stated that the contract was canceled if the CO did not notify the contractor prior to the beginning of the next succeeding fiscal year that funds were available for performance in the succeeding year, while the latter clause permitted the CO to notify Cessna of the availability of funds on the first day of the succeeding fiscal year. In basic terms, Cessna asserts, the Cancellation of Items clause required the Navy to provide it notification by September 30, 1988, while section H-8 gave the Navy until October 1.

Furthermore, Cessna argues that the Cancellation of Items clause was a mandatory clause required to be included in all multi-year contracts pursuant to DAR § 1-322.6(c), [FN18] and that section H-8 constitutes a deviation from the Cancellation of Items clause under DAR § 1-109.1(i). [FN19] Under those circumstances, says Cessna, DAR § 1-109.2 required that the Navy obtain authority before implementing the deviation, which was not done. [FN20] Cessna asserts that the failure to obtain a deviation rendered section H-8 unenforceable and that therefore the Navy's exercise of the second and third option years was ineffective.

FN18. Section 1-322.6(c) states that DAR § 7-1903.33(d)--the Cancellation of Items clause--must be included in multi-year service contracts. The analogous FAR provision is 48 C.F.R. § 17.109(a) (1996).

FN19. Section 1-109.1(i) defines deviation to include the situation where "a contract clause is set forth in ASPR

[Armed Services Procurement Regulation] for use verbatim, [and] a contract clause covering the same subject matter which varies from the ASPR coverage [is used]." The analogous FAR provision is 48 C.F.R. § 1.401 (1996).

FN20. Section 1-109.2 states that deviations from the regulations affecting only one contract or procurement may be authorized provided that (i) the circumstances justify a deviation, and (ii) written notice of the deviation is furnished to particular agency officials. The analogous FAR provision is 48 C.F.R. § 1.403 (1996).

We reject Cessna's arguments. Initially, as a contractual matter, section H-8 took precedence over the Cancellation of Items clause. In that regard, the Order of Precedence clause of the contract stated as follows:

In the event of inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the Specifications); (b) General Provisions; (c) the other provisions of the contract whether incorporated by reference or otherwise; and (d) the Specifications and (e) the Contractor's proposal No. CMP-1351.

In this case, section H-8 was found in the contract's schedule, while the Cancellation of Items clause was a general provision. See Cessna II, 96-1 BCA at 139,699. However, as Cessna points out, we must further consider the propriety of including section H-8 in the contract at all because it deviated from the DAR-mandated Cancellation of Items clause, and the Navy did not seek authorization for its inclusion.

Cessna's argument on this point suffers from the same defect as its first contention on appeal--that appropriated funds must be apportioned before they are obligated. We conclude that the primary purpose behind the Cancellation of Items clause is to protect the government's interest by encouraging government officials to monitor the availability of funds for each fiscal year and to provide notice to contractors accordingly. Consequently, the clause may not form the basis for a contractor's right of action. In order for contract performance to continue each year, the Cancellation of Items clause required that the CO notify the contractor that funds would be available for the succeeding fiscal year, act which inherently required the CO to first ensure that sufficient funds are in fact available. See DAR § 7-1903.33(d).

In ITT Federal Lab., A Division of IT&T Corp., ASBCA No. 12987, 69-2 BCA ¶ 7849, at 36,490, 1969 WL 788 (1969), rev'd on other grounds, 197 Ct.Cl. 11, 453 F.2d 1283 (1972), the contract in dispute contained two clauses: (i) a Limitation of Price and Contractor Obligations clause, which, in general, required the contracting officer to notify the contractor when funds became available for the succeeding program year, and limited the contractor's ***1455** obligations until such notice was given; and (ii) a Cancellation of Items clause, which was substantively the same as the Cancellation of Items clause at issue in this case. ITT, 69-2 BCA at 36,485-86. The Board referred to these provisions collectively as "notice of availability of funds" provisions. Id. at 36,490. In the course of deciding whether the government had complied with these notice provisions, the Board determined that a primary purpose of the provisions was "to give [the government] control over the timing of future expenditures of appropriated funds, a provision

necessary in the light of the practices by which Congress exercises budgetary control." [FN21] Id.

FN21. The Board in ITT also stated that another primary purpose was "to relieve [the contractor] of any obligation to incur production costs for successive years until funds were assured from which to pay [it]." ITT, 69-2 BCA at 36,485-86. However, this stated purpose related not to the contract's Cancellation of Items clause, but rather related to its Limitation of Price and Contractor Obligations clause, subsection (d), which stated in pertinent part that "[t]he Contractor is not obligated to incur costs for the performance required for any Program Year after the first unless and until he has been notified in writing by the Contracting Officer of an increase in availability of funds." ASPR § 1-322.4(a)(1966).

The Navy apparently deviated from the Cancellation of Items clause in drafting section H-8 without first obtaining the proper authority to do so. However, because the Cancellation of Items clause is primarily for the benefit of the government, Cessna may not rely on the deviation in arguing that the Navy's exercise of the options for fiscal years 1990 and 1991 was ineffective. Thus, Cessna is bound by section H-8, and there is no dispute that the Navy fully complied with the section.

CONCLUSION

For the foregoing reasons, the decision of the Board is affirmed.

COSTS

Each party shall bear its own costs.

AFFIRMED.

Appeal of Cessna Aircraft Company

Under Contract No. N00019-83-C-0090

March 12, 1993

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OPINION BY ADMINISTRATIVE JUDGE TING

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Cessna Aircraft Company (Cessna) entered into a multiyear contract for training Undergraduate Naval Flight Officers (UNFO) with the Navy. Following the 5-program years of the contract, the Navy exercised an option to continue the contract for another three years. Cessna alleges that the exercise of the option was ineffective and submitted a $25 million claim for performance of contract services during the option period. This appeal was docketed upon failure of the contracting officer to issue a decision on Cessna's certified claim.

Cessna has filed a motion for partial summary judgment of 11 of 15 counts in its complaint. In Counts I, II, III, IV and VII, Cessna invokes violation of various funding laws and regulations as grounds for invalidating the option exercise. In Counts VIII, IX, X, XI, XII and XIII, Cessna invokes violation of funding laws and regulations as alternate grounds for invalidating the Navy's notices of funds availability required to be issued to continue the Second and Third Option Years should the Board uphold the option exercise.

The Navy has cross moved for summary judgment on the same 11 counts.

The Navy considers funding contracts as internal 'housekeeping' matters, and challenges Cessna's legal 'standing' to bring such matters before the Board. We view the Navy's standing argument as going to our jurisdiction to hear and decide issues which relate to the validity of the Navy's option exercise and notices of funds availability. This jurisdictional challenge will be more thoroughly addressed at the outset of our decision.

The Board entertained a full day of oral argument on 10 December 1992.

GENERAL UNDISPUTED FACTS

1. On 10 May 1983, the Naval Air Systems Command ('NAVAIR,' 'the Navy' or 'the Government') awarded Contract No. N00019-83-C-0090 (the '0090 contract') to Cessna Aircraft Company (Cessna) (R4, tab 1). The contract required Cessna to provide training services for undergraduate naval flight officers at the U.S. Naval Air Station, Pensacola, Florida, during five program years, commencing 1 August 1984, and ending 30 September 1988 (R4, tab 1 at 5-1 to 5-9). Each program year ended on the last day of the Government's fiscal year (FY), i.e., 30 September.

2. The 0090 contract required Cessna to provide, among other equipment and services, 'services to assist in Radar and Navigation training of Undergraduate Naval Flight Officers. These services shall consist of an annual rate of 17,000 airborne training service hours . . . on Contractor-furnished radar equipped aircraft of common configuration. The radar equipped aircraft shall meet the requirements of the 'Functional Description, Undergraduate Naval Flight Officer (UNFO) Training System,' Attachment (1) . . . .' (R4, tab 1 at 2-1) Paragraph 1.1, 'Scope,' of Attachment (1) provides that 'The system consists of airborne training services utilizing commercial aircraft, associated radar, an Air-to-Air Intercept Radar Training Device, a Ground Radar Mapping Training Device, all maintenance (aircraft and trainers), full logistics support and required instructor pilot services.' (R4, tab 1 at 146)

3. The contract 'SCHEDULE' contained at Section H-5 the 'Option To Extend Services' clause prescribed by DAR 7-1903.22 (29 APR 1977). This clause provided:

The Government may require the Contractor to continue to perform any or all items of service under this contract within the limits stated in the Schedule. The Contracting Officer may exercise this option, at any time within the period specified in the Schedule, by giving written notice to the Contractor. The rates set forth in the Schedule shall apply to any extension made pursuant to this option provision unless provision for appropriate price adjustment has been made elsewhere in this contract.

(R4, tab 1 at 7-13)

4. Section H-6, 'Exercise Of Option,' of the contract Schedule provided:

Pursuant to the 'Option to Extend Services- clause, the option for the three option years will be exercised, if at all, in writing by a unilateral modification to this contract issued by the Contracting Officer, Naval Air Systems Command, not later than 1 October 1988.

(R4, tab 1 at 7-13)

5. The First Option Year (FY 1989) ran from 1 October 1988 to 30 September 1989. The Second Option Year (FY 1990) ran from 1 October 1989 to 30 September 1990. The Third Option Year (FY 1991) ran from 1 October 1990 to 30 September 1991. (R4, tab 1 at 5-9 to 5-11)

6. Section H-9 of the contract Schedule is entitled 'Cancellation Ceiling.' It established cancellation ceilings for program years two through five of the five-year base period. It also established cancellation ceilings for years two and three of the three-year option period. Under Section H-9, If the Government exercised the three-year option, $29 million would be the cancellation ceiling 'if second and following option years are cancelled,' and $26.5 million would be the cancellation ceiling 'if third option year is cancelled.' (R4, tab 1 at 7-17)

7. The notice requirement contained in Section H-8 of the contract, entitled 'Multiyear procurement' provides in part:

If the three year option is exercised, the date within which the contracting officer . . . will notify the Contractor of the availability of funds sufficient for performance of the requirements for the

Second Option Year (Fiscal Year 1990) is 1 October 1989.

Third Option Year (Fiscal Year 1991) is 1 October 1990.

(R4, tab 1 at 7-16)

8. The General Provisions of the contract incorporated by reference, the 'Disputes' clause (1980 JUN)(DAR 7-103.12(a)), and the 'Availability Of Funds' clause (1962 SEP) (DAR 7-104.91 (a)), among others. The 'Availability of Funds' clause provides:

Funds are not presently available for this procurement. The Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment for the contract purposes can be made. No legal liability on the part of the Government for payment of any money shall arise unless and until funds are made available to the Contracting Officer for this procurement and notice of such availability, to be confirmed in writing by the Contracting Officer, is given to the Contractor.

9. A 'Financial Accounting Data Sheet' -- DD Form No. 1140 -- is used

by the Navy to commit funds to a contract. On 30 September 1988, the expiration date of the 0090 contract, a NAVAIR budget analyst executed a Financial Data Sheet, post-dating it to 1 October 1988 with the proviso that 'EXECUTION OF THIS DOCUMENT IS CONTINGENT ON CONGRESSIONAL PASSAGE OF THE FY 89 APPROPRIATION ACT OR OTHER AUTHORITY.' (R4, tab 7) The amount of funds cited on the form was $22,576,253. The fund amount cited did not cover the $29 million potential cancellation liability for the second and following option years under Section H-9 of the contract Schedule.

10. In 1988, 1 October was a Saturday. On that day, the contracting officer was told by one of her supervisors that the President had signed the Department of Defense Appropriation Act, 1989 (Pub. L. 100-463, 102 Stat. 2270 (1988)).

11. Sometime during 1 October 1988, the contracting officer covered over the budget analyst's proviso with white correction fluid and redrew the whited-out vertical lines that had been on the Financial Accounting Data Sheet.

12. Also on 1 October 1988, the contracting officer executed Modification No. P00027 for the purpose of exercising the three-year option pursuant to Section H-6 of the 0090 contract. Among the documents attached to the modification was the whited-out Financial Accounting Data Sheet. The documents showed that funds ($22,576,253) were provided for the First Option Year (FY 1989) (R4, tab 2a).

13. At 6:22 p.m., 1 October 1988, the contracting officer by means of facsimile transmitted to the attention of Cessna's Vice President for Finance, at Cessna's facility in Wichita, Kansas, documents described as 'the modification exercising the three-year multiyear option and providing funding for FY 89' (R4, tab 9).

14. October 1, 1988, being a Saturday, was not a normal business day for Cessna (complaint par. 28). Cessna personnel responsible for the 0090 contract found at a telecopy machine at Cessna's Wichita facility a facsimile copy of Modification No. P00027, including a copy of the Financial Accounting Data Sheet, shortly after the facility opened for business on 3 October 1988.

15. By letter dated 7 October 1988, Cessna advised the contracting officer that it did not consider that the Navy had validly exercised the option (R4, tab 11).

16. The contracting officer responded to Cessna's 7 October 1988 letter by letter dated 7 December 1988. The letter stated in substance that the option had been effectively exercised and that the 0090 contract remained in effect (R4, tab 12).

FY 1990 Funding

17. On 29 September 1989, the President signed into law Continuing

Appropriations, 1990, Pub. L. 101-100, 103 Stat. 638 (FY 1990 Continuing Resolution). This law appropriated funds to DoD for FY 1990 under a continuing resolution. Section 102 of the FY 1990 Continuing Resolution provided that 'appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until..... (c) October 25, 1989 . . . .' Pub. L. 101-100, 103 Stat. 640 (1989)

18. On 1 October 1989, the contracting officer telecopied to Cessna Modification No. P00034. The modification stated that it provided funds for the 'Second Year (FY 1990) of the three year multiyear option exercised by contract modification P00027 . . . .' Modification No. P00034 was issued to notify Cessna of the availability of funds for performance for the Second Option Year. The modification showed $23,282,519 to have been obligated for contract line items for the Second Option Year (FY 1990) (R4, tab 2h). It did not fund the Third Option Year (FY 1991), nor the $26.5 million cancellation charges for the Third Option Year.

19. The Department of Defense Appropriations Act, 1990, was enacted into law on 21 November 1989. Pub. L. 101-165, 103 Stat. 1112 (1989).

FY 1991 Funding

20. On 1 October 1990, the President signed into law Continuing Appropriations, 1991, Pub. L. 101-403, 104 Stat. 867 (FY 1991 Continuing Resolution). Section 108 of this FY 1991 Continuing Resolution provided that 'appropriations and funds made available and authority granted pursuant to title I of this joint resolution shall be available until . . . (c) October 5, 1990 . . . .' Pub. L. 101-403, 104 Stat. 869.

21. On 1 October 1990, the contracting officer telecopied to Cessna Modification No. P00038. The modification was 'to fund the Third Year (FY 1991) of the three year multiyear option exercised by contract modification P00027.' Modification No. P00038 was issued to notify Cessna of the availability of funds for performance for the Third Option Year. The modification showed $23,866,204 to have been obligated for contract line items for the Third Option Year (FY 1991). (R4, tab 21)

22. On 9 October 1990, the President signed into law Further Continuing Appropriations, 1991, Pub. L. 101-412, 104 Stat. 894. Section 108 of this second FY 1991 Continuing Resolution provided that 'appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until. . .. (c) October 19, 1990. . . . ' Pub. L. 101-412, 104 Stat. 896.

23. The Department of Defense Appropriations Act, 1991, was enacted into law on 5 November 1990. Pub. L. 101-511, 104 Stat. 1856.

Procedural Posture of the Appeal

24. Cessna initiated an action in the United States District Court for the

District of Kansas on 10 March 1989. The action sought declaratory judgment under Section 10 of the Administrative Procedure Act, 5 U.S.C. sec. 702, to the effect that the Navy's exercise of the option was in violation of the Antideficiency Act, 31 U.S.C. secs. 1341-1342, the Apportionment statutes, 31 U.S.C. secs. 1511-1519, and Section 8042 of the DoD Appropriation Act, 1989. By Memorandum And Order of 13 August 1990, the District Court found that Cessna's claim was actually one for money damages in an amount in excess of $10,000. The Court denied the Government's motion to dismiss and ordered that the action be transferred to the United States Claims Court. See Cessna Aircraft Co. v. United States, 744 F. Supp. 260 (D. Kansas 1990).

25. Cessna submitted a certified claim in the amount of $29,054,615 to the contracting officer on 8 April 1991. By letter dated 24 June 1991, Cessna's Chairman and Chief Executive Officer revised the claim to $25,706,080, to '[correct] an inadvertent error in the bid and development expense rates used in the previously submitted price proposal . . . [and to update) the pricing from the earlier submission.' Cessna's claim was recertified as modified.

26. The contracting officer did not issue a decision within 60 days as required by Section 6(c)(1) of the Contract Disputes Act, 41 U.S.C. sec. 605(c)(1). Cessna appealed on the basis that its claim was deemed denied pursuant to 41 U.S.C. sec. 605(c)(5) by notice dated 10 July 1991. The Board docketed the appeal on 11 July 1991. On 21 August 1991, the Government moved to dismiss the appeal on the ground that no contracting officer's decision had been issued. The Board denied the Government's motion on 30 September 1991. Cessna Aircraft Co., ASBCA No. 43196, 92-1 BCA par. 24,425.

27. While the Government's motion to dismiss was pending, Cessna filed on 5 September 1991, APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT and MEMORANDUM IN SUPPORT OF APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT and 43 accompanying exhibits (henceforth to be referred to as MOTION PAPERS 1). Over Cessna's objections, the Board granted two Government requests for a time extension to file its opposition to Cessna's motion. 'RESPONDENT'S MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF RESPONDENT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT' (henceforth MOTION PAPERS 2) dated 8 January 1992, was received at the Board on 14 January 1992.

28. Thereafter, Cessna filed a reply to the Government's opposition and cross- motion on 13 March 1992 (CESSNA'S REPLY TO THE NAVY'S OPPOSITION TO CESSNA'S MOTION FOR SUMMARY

JUDGMENT, AND OPPOSITION TO THE NAVY'S CROSS-MOTION FOR SUMMARY JUDGMENT with 78 exhibits) (henceforth MOTION PAPERS 3). The Government's reply to Cessna's opposition to the Government's Cross-Motion was filed on 11 May 1992 (RESPONDENT'S REPLY TO APPELLANT'S OPPOSITION TO THE NAVY'S CROSS-MOTION FOR SUMMARY JUDGMENT) (henceforth MOTION PAPERS 4).

29. The Government submitted its Rule 4 file by letter dated 10 January 1992. Its answer to Cessna's complaint was filed by letter dated 17 January 1992 (R4, tab 19). By letter dated 26 May 1992, the Board granted Cessna leave to file a response to four defenses said to have been raised for the first time in the Government's MOTION PAPERS 4. Cessna's response, APPELLANT'S REPLY TO NAVY'S NEW DEFENSES IN OPPOSITION TO CESSNA'S MOTION FOR PARTIAL SUMMARY JUDGMENT (henceforth MOTION PAPERS 5), was received by the Board on 17 July 1992.

30. Concomitantly with the filing of the aforementioned summary judgment papers, the Government on 14 January 1992 filed its 'MOTION TO DISMISS FOR LACK OF JURISDICTION ALL COUNTS OF APPELLANT'S COMPLAINT WHICH ALLEGE VIOLATIONS OF CRIMINAL LAW.' This was followed by Cessna's opposition (CESSNA'S OPPOSITION TO NAVY'S MOTION TO DISMISS) filed on 13 March 1992 and the Government's reply (REPLY TO APPELLANT'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS) filed on 12 May 1992. The Board issued its decision denying the Navy's Motion to Dismiss on 20 October 1992. Cessna Aircraft Co., ASBCA No. 43196, 93-_ BCA par. __.

31. By letter dated 11 January 1993, a month after oral argument, Cessna forwarded 'APPELLANT'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT AND TO AMEND APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT' and 'MEMORANDUM IN FURTHER SUPPORT OF APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT' (henceforth MOTION PAPERS 6). The motion sought to (1) amend Count I of its complaint and its partial summary judgment motion to 'include the allegation that the Navy violated the Antideficiency Act by obligating FY 1989 Navy Operations & Maintenance funds before such funds were allocated to the Navy by the Secretary of Defense' (emphasis added) and (2) 'amend its Motion for Partial Summary Judgment to include a request for an order granting summary judgment on Count XIII.' (MOTION PAPERS 6 at 1-2) The Board granted Cessna's motion and instructed the Navy to respond by 26 February 1993.

Statutory Bases of Cessna's Motion for Partial Summary Judgment

32. Cessna's complaint contained 15 (I to XV) counts. Eight of the 15 counts alleged violations of 31 U.S.C. sec. 1341 (Antideficiency Act) or 31 U.S.C. sec. 1517 (apportionment statute):

Count No.	Statute Allegedly Violated
I	31 U.S.C. sec. 1517(a)(1)
II	31 U.S.C. sec. 1341(a)(1)(B)
III	31 U.S.C. sec. 1517(a)(2)
IV	31 U.S.C. sec. 1517(a)(2)
IX	31 U.S.C. sec. 1341(a)(1)(A) & (B)
X	31 U.S.C. sec. 1517(a)(2)
XII	31 U.S.C. sec. 1341(a)(1)(A) & (B)
XIII	31 U.S.C. sec. 1517(a)(2)

33. 31 U.S.C. sec. 1341 (Limitations on expending and obligating amounts) provides, in part:

(a)(1) An officer or employee of the United States Government . . . may not-

(A) make or authorize an expenditure or obligation EXCEEDING an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve . . . [the United States] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

(Emphasis added)

31 U.S.C. sec. 1517 (Prohibited obligations and expenditures) provides in part:

(a) An officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation EXCEEDING-

(1) an apportionment; or

(2) the amount permitted by regulations prescribed under section 1514(a) of this title.

(Emphasis added)

The Bases of Cessna's Motion for Partial Summary Judgment

34. In Count I [Obligation Before Apportionment and Allocation], Cessna alleges that the contracting officer violated 31 U.S.C. sec. 1517(a)(1), DoD Directive 7200.1, and Navy Comptroller Manual (NCM) pars. 073000 - 073002, because she issued Modification No. P00027 obligating FY 1989 funds for the first year of the three-year

option period prior to apportionment and allocation of FY 1989 funds (MOTION PAPERS 1 at 24-28).

35. In Count II (Involvement in a Contract Before Appropriation], Cessna alleges that the contracting officer violated 31 U.S.C. sec. 1341(a)(1)(B) in exercising the option (by Modification No. P00027) because she 'involved the government in a contract for payment of money in FY 1990 and 1991 [Second and Third Option Years] before appropriations for those years had been made' (MOTION PAPERS at 29-35).

36. In Count III [Falsified Funding Documents], Cessna alleges that the contracting officer in 'whiting-out' the budget analyst's proviso on the Financial Accounting Data Sheet was 'deliberately falsifying an official government document.' In its Motion for Partial Summary Judgment, Cessna suggested that the contracting officer might have violated 18 U.S.C. secs. 1001 and 1008 and 'an array of other felony statutes including 18 U.S.C. secs. 287, 471, 472, 495, 461, 648, 653, 666, 912, 1002, 1003, 1016, 1017, 1028, and 1031.' (MOTION PAPERS, n.12 at 38) /1 Leaving aside the 'array' of criminal statutes Cessna alleges that the contracting officer might have violated, the crux of Count III is that 'The option exercise was ineffective' because 'The altered Financial Accounting Data Sheet was void and did not validly commit funds in support of the purported option exercise'.

37. In Count IV [Cancellation Charges Exceeded Available Funds in FY 1989), Cessna alleges that the option was ineffectively exercised because the modification (Modification No. P00027) exercising the option violated the law (31 U.S.C. sec. 1517, 31 U.S.C. sec. 1514(a) and implementing regulatio by committing funds for the contingent liability for cancellation charges ($29 million) in excess of funds ($22,576,253) authorized for FY 1989. (MOTION PAPERS I at 50-52)

38. In Count VII [Navy Failed to Notify Congress], Cessna alleges that Section 8042 of the FY 1989 DoD Appropriation Act 'required the Navy to submit notice to Congress before extending or renewing for a term of 18 months or more any contract involving aircraft obtained through 'lease, charter, or similar agreement." Cessna alleges that the purported option exercise (Modification No. P00027) was 'unlawful, invalid, and of no force or effect' because the Navy 'did not notify Congress of its intention to extend for three years Contract No. 0090.' (MOTION PAPERS 1 at 41-50)

39. In Count VIII [Funding Notice for Second Option Year Was Late], Cessna alleges that the Second Option Year of the 0090 contract was automatically cancelled pursuant to DAR sec. 7-1903.33(d) because the contracting officer did not issue a notice of funds availability for FY 1990 prior to the beginning of the fiscal year (MOTION PAPERS 1 at

54-56).

40. In Count IX [Funding Notice for Second Option Year Was an Obligation in Advance of Appropriated Funds), Cessna alleges that in issuing the funding notice (Modification No. P00034) for the Second Option Year, the contracting officer obligated funds ($23,282,519) in advance of appropri- ations in violation of 31 U.S.C. sec. 1341(a)(1)(A) & (B) because the Continuing Resolution (Pub. L. 101-100) for FY 1990 expressly stated that funds were available only until 25 October 1989 (finding 17; MOTION PAPERS I at 53-54).

41. In Count X [Cancellation Charges Exceeded Available Funds in FY 1990), Cessna alleges that the contracting officer's notice of funding availability (Modification No. P00034 for $23,282,519) violated 31 U.S.C. sec. 1517 and implementing regulations because 'it exposed the government to a contingent liability of up to $26.5 million of cancellation charges in the event the third option year was cancelled' (MOTION PAPERS 1 at 52).

42. In Count XI [Funding Notice for Third Option Year Was Late], Cessna alleges that the Third Option Year of the 0090 contract was automatically cancelled pursuant to DAR sec. 7-1903.33(d) because the contracting officer did not issue a notice of funds availability for FY 1991 prior to the beginning of the fiscal year (MOTION PAPERS 1 at 54-56).

43. In Count XII [Funding Notice for Third Option Year Was an Obligation in Advance of Appropriated Funds], Cessna alleges that in issuing the funding notice (Modification No. P00038) for the Third Option Year, the contracting officer obligated funds ($23,866,204) in advance of appropria- tions in violation of 31 U.S.C. sec. 1341(a)(1)(A) & (B) because the first Continuing Resolution for FY 1991 stated that funds were available only until 5 October 1990, and the second Continuing Resolution for FY 1991 stated that funds were available only until 19 October 1990 (findings 20, 22; MOTION PAPERS 1 at 53- 54).

The Navy's Cross Motion for Summary Judgment

44. The Navy opposed Cessna's motion and crossed for summary judgment on all 10 counts (I, II, III, IV, VII, VIII, IX, X, XI, XII) that Cessna initially moved for summary judgment. In addition, the Navy moved for summary judgment on Count XIII (MOTION PAPERS 2). Cessna later amended its motion for partial summary judgment and cross-moved for summary judgment of count XIII (MOTION PAPERS 6).

45. Count XIII involves the same issue as Count I. In Count XIII [Funding Notice for Third Option Year Was in Advance of Apportioment [sic] and Subdivision of Funds), Cessna alleges that the contracting

officer's funding notice (Modification No. P00038) was issued 'before FY 1991 appropriations were apportioned by OMB, allocated by DOD, and/or suballocated by the Navy, in violation of 31 U.S.C. sec. 1511-1519 and regulations thereunder,' and was therefore unlawful, invalid and of no force or effect.

DECISION

Jurisdiction

In opposition to Cessna's Motion for Partial Summary Judgment, the Navy contends that Cessna lacked standing to challenge matters relating to the Navy's alleged 2 yon-compliance with what essentially are 'funds control statute[s].' - We view the Navy's standing challenge as going to our jurisdiction to hear and decide matters relating to funding of contracts. Cessna derives its right to bring its appeal before us by virtue of its status as a Government contractor under the Contract Disputes Act. 41 U.S.C. secs. 601-613. That Act defines the term 'contractor' as 'a party to a Government contract other than the Government,' and it applies 'to any express or Implied contract . . . entered into by an executive agency for - . . . ; (2) the procurement of services.' 41 U.S.C. sec. 601(4) and sec. 602(a)(2).

There is no question of Cessna's status as a Government contractor. Nor is there any question that the 0090 contract is a contract for the procurement of services within the scope of 41 U.S.C. sec. 602(a)(2). Furthermore, In accordance with the requirement of 41 U.S.C. sec. 605(c)(1), Cessna submitted a properly certified claim to the contracting officer. The commencement of the appeal was authorized upon the failure of the contracting officer to issue a decision in accordance with 41 U.S.C. sec. 605(c)(5). Cessna Aircraft Co., ASBCA No. 43196, 92-1 BCA par. 24,425.

As reflected in the contracting officer's decision, belatedly issued on 15 November 1991 (R4, tab 19), the parties' dispute which gave rise to Cessna's claim centered on whether the Navy effectively exercised the three-year option and issued the funds availability notices for the Second and Third Option Years. The right to exercise the option and the requirement to issue the funding notices stemmed from the terms of the 0090 contract. Under the CDA, we have jurisdiction 'to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency' (emphasis added). 41 U.S.C. sec. 607(d). We conclude that this appeal related to the 0090 contract made by the Navy. Hence, Cessna's standing to bring this appeal and our jurisdiction to decide it are grounded on the provisions of the CDA. Cessna Aircraft Co., ASBCA No. 43196, 93-_ BCA par ___ ; see Ecee Inc. v. Federal Energy

Regulatory Com'n, 645 F.2d at 339, 349-50 (5th Cir. 1981).

Counts I & XIII

Additional Findings of Fact

Apportionment Statutes And Regulations Relied Upon By Cessna

46. 31 U.S.C. sec. 1512 (Apportionment and reserves) provides in part, the following:

(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period.

47. 31 U.S.C. sec. 1514 (Administrative division of apportionments) provides in part, the following:

(a) . . . the head of each executive agency . . . shall prescribe by regulation a system of administrative control not inconsistent with accounting procedures prescribed under law. The system shall be designed to-

(1) restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of the appropriation; and

(2) enable the official or the head of the executive agency to fix responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.

48. Pursuant to 31 U.S.C. sec. 1514(a), DoD issued DoD Directive No. 7200.1, 7 May 1984. This Directive applies to:

the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Defense Agencies and the Uniformed Services University of the Health Sciences (hereafter referred to collectively as 'DoD Components') and includes all civil and military functions under the direct supervision of a DoD Component.

(MOTION PAPERS 1 at tab 38) For apportioned funds, a violation of Do D Directive
7200.1 is a violation of 31 U.S.C. sec. 3/517. Since DoD Directive 7200. 1 was
issued pursuant to 31 U.S.C. 1517, it has the force and effect of law. (See DoD
Accounting Manual, October 1983, MOTION PAPERS 3, tab 46)

49. Paragraph G, 'APPORTIONMENTS,' of DoD Directive 7200.1, provides:

1. When appropriations or other funds are required to be apportioned to a DoD Component under law, a request for the apportionment or reapportionment shall be prepared and submitted through the ASD(C) to the Director of OMB. The request shall be in such form and at such time as the ASD(C) may prescribe to conform with the requirements of the

Director of OMB (see reference (e)).

2. Obligations during any apportionment period must not EXCEED the amount of the apportionment available for that period or of any administrative subdivision of the apportionment.

(Emphasis added) (MOTION PAPERS 1, tab 38 at 5-2)

50. Paragraph K, 'OBLIGATIONS AND EXPENDITURE,' of DoD Directive 7200.1, provides in part the following:

2. Except as provided by subsection K.1., above, no DoD official shall authorize (such as, commit) or create any obligation, or make any expenditure under any appropriation or fund EXCEEDING the following:

a. The available amount of such appropriation or fund.

b. The available amount of an apportionment or reapportionment or administrative subdivision thereof.

(Emphasis added) (MOTION PAPERS 1, tab 38 at 5-5 to 5-6)

51. The DoD Accounting Manual defines the terms 'apportionment' as follows:

4. Apportionments and Reapportionments

a. An apportionment or reapportionment is a distribution made by OMB of amounts available for obligation in an appropriation or fund account. Except in certain instances, as specified in OMB Circular No. A-34 . . . apportionments and reapportionments by OMB are required before funds may be obligated. The distribution of apportionments is part of an overall financial plan for the year that is based on a forecast of obligations to be incurred within an appropriation. (OMB's apportioned amount is in response to a DoD request made on DD Form 1105, 'Apportionment and Reapportionment Schedule,' . . .) Apportionments divide amounts available for obligation by specific time periods (usually quarters), activities, projects, objects, or by combinations of these categories.

b. The completed DD Form 1105 showing OMB's apportioned amounts is normally the source document used to record apportionments and reapportionments.

(MOTION PAPERS 3, tab 46 at 22-6)

52. Both parties have relied on provisions contained in the Navy Comptroller Manual (NCM). A brief discussion of where the NCM stands in the hierarchy of funding laws and regulations is necessary. 31 U.S.C. sec. 1514(a) requires executive agencies to prescribe a system of administrative controls. DoD Directive 7200.1 was issued pursuant to 31 U.S.C. sec. 1514 and approved by the Director of OMB. The DoD Directive, in turn, required each DoD Component, including the Navy, 'to

establish and maintain adequate systems of accounting for positive control of appropriations and other funds made available.' The NCM is a 'regulatory issuance' of the Navy implementing the DoD Directive. The DoD Directive is reproduced in its entirety, without change, as Appendix A, Volume 2, of the NCM. (Supp. R4, tab 30 at encl. 5; see also oral arg., tr. 132-34; Navy letter and attachments of 22 January 1993 and MOTION PAPERS 6). Cessna referred to Paragraph 023004 of the Navy Comptroller Manual (NCM) which provides in part:

023004 APPORTIONMENTS AND ALLOCATIONS

1. APPORTIONMENT

a. Definition. An apportionment is a determination by the Director of the Office of Management and Budget as to the amount of obligations which may be incurred under an appropriation, fund, or contract authorization during a specific period.

* * *

c. Apportionments Are Binding. Except under certain circumstances as prescribed by law, no agency shall authorize expenditures or involve the Government in any contract or other obligations or commitment for the future payment of money IN EXCESS of the amount currently available therefor under the approved or revised apportionment.

(Emphasis added) (MOTION PAPERS 3, tab 48 at 3-2 to 3-3)

53. Referring to NCM par. 073002, Cessna asserts that 'The NCM establishes a sequential funding process whereby funds are first apportioned, then allocated to the Secretary of Defense, and then suballocated or allotted through the chain of command in the Navy.' NCM par. 073002(2) provides:

073002 PROCEDURES FOR ESTABLISHING AVAILABILITY

* * *

2. PURSUANT TO APPROPRIATION ENACTMENTS. On the basis of the enacted Department of the Navy appropriations, the Treasury Department prepares appropriation warrants which, after being countersigned by the General Accounting Office, are forwarded to the Department of the Navy as certification that the specified amounts are available for obligation and expenditure. Fund availability is established

through compliance with procedures for submission, review, and Office of Secretary of Defense (OSD)/Office of Management and Budget(OMB) approval of apportionments and/or financial plans. In conjunction with the apportionment procedure, the Office of the Assistant Secretary of Defense (Comptroller) establishes the authorized level of obligation and expenditure for each appropriation, as well as any controls or limitations required below the appropriation level as a means of requiring compliance with the terms of approved programs and budgets. In passing obligational authority (as an allocation or as a limitation within operating budget authority) to other echelons of command, the Comptroller creates adminis- trative subdivisions of appropriated funds with clearly defined responsibility for 31 U.S. Code 1517 violations i.e., for the creation of any obligations or making of any expenditure IN EXCESS of an apportionment or reapportionment, or of an amount specified in an administrative subdivision thereof. The process of distributing financial authority is continued through the chain of command in the form of suballocations, allotments, operating budgets, or operating targets. Allotments, as well as the specified obligational authority within operating budgets, constitute administrative subdivisions of appropriated funds, subject to the sanctions of the Anti-Deficiency Act (31 U.S. Code 1518 and 1519) for the holders of allotments or operating budgets. Operating targets (e.g., those established for individual ships by type commanders) are administrative limitations of funds for which the legal responsibility is retained by the grantor.

(Emphasis added) (MOTION PAPERS 3, tab 39 at 3-3 to 3-4)

54. According to Cessna, the President has delegated the apportionment authority to OMB by Executive Orders. /4 Cessna says that 'Section 44.10 of OMB Circular A-34 provides that only OMB has the authority to apportion funds.' OMB Circular A-34 reiterates the statutory rule that an obligation of funds in excess of an apportionment violates the Antideficiency Act. (MOTION PAPERS 1 at 25 and tab 37) The Navy has not disputed these assertions; we find them to be undisputed facts for purposes of the motion before us.

55. Navy Operation and Maintenance (O & M) funds for FY 1989 were appropriated by the Department of Defense Appropriations Act, 1989, enacted into law on 1 October 1988. Pub. L. 100-463, 102 Stat. 2270 (1988). Funds appropriated by this Act were not apportioned to DoD until 20 October 1988. On that date, the Deputy Associate Director for National Security, OMB, signed the DD Form 1105 -- "Apportionment And Reapportionment Schedule.' (MOTION PAPERS at tab 17) We find the foregoing facts to be undisputed.

Apportionment Statutes And Regulations Relied Upon by the Navy

56. 31 U.S.C. sec. 1513 (Official controlling apportionments) provides in part, as follows:

(b)(1) The President shall apportion in writing an appropriation available to an executive agency . . . that is required to be apportioned under section 1512 of this title. The head of each executive agency to which the appropriation is available shall submit to the President information required for the apportionment in the form and the way and at the time specified by the President. The information shall be submitted not later than the later of the following:

(A) 40 days before the beginning of the fiscal year for which the appropriation is available; or

(B) 15 DAYS AFTER THE DATE OF ENACTMENT OF THE LAW BY WHICH THE APPROPRIATION IS MADE AVAILABLE.

(2) The President shall notify the head of the executive agency of the action taken in apportioning the appropriation under paragraph (1) of this subsection not later than the later of the following:

(A) 20 days before the beginning of the fiscal year for which the appropriation is available; or

(B) 30 DAYS AFTER THE DATE OF ENACTMENT OF THE LAW BY WHICH THE APPROPRIATION IS MADE AVAILABLE,

(c) By the first day of each fiscal year, the head of each executive department of the United States Government shall apportion among the major organizational units of the department the maximum amount to be expended by each unit during the fiscal year out of each contingent fund appropriated for the entire year for the department. Each amount may be changed during the fiscal year only by written direction of the head of the department. The direction shall state the reasons for the change.

(Emphasis added) In this case the FY 1989 DoD Appropriations Act was enacted
into law on 1 October 1988. Thus, 31 U.S.C. sec. 1513(b)(1)(B) and sec. 1513
(b)(2)(B) would apply. We find that OMB had until 31 October 1988, 30 days
after 1 October 1988, to apportion the funds appropriated by the FY 1989 DoD
Appropriations Act.

57. The Navy brings to our attention a paragraph in the NCM which deals specifically with 'AVAILABILITY OF FUNDS PRIOR TO APPORTIONMENT':

022064 AVAILABILITY OF FUNDS PRIOR TO APPORTIONMENT

AFTER THE BEGINNING OF THE FISCAL YEAR AND PRIOR TO THE SPECIFIC ALLOCATION OF FUNDS PURSUANT TO APPORTIONMENT to the head of the responsible office, bureau, command, and Headquarters U.S. Marine Corps by the Comptroller of the Navy, the head of the responsible office is authorized by the Comptroller of the Navy to suballocate funds and to issue allotments under any appropriation act of such fiscal year IN SUCH AMOUNTS AS WILL NOT EXCEED THE AMOUNT CONTAINED IN the appropriation warrant or the request for APPORTIONMENT AND ALLOCATION SUBMITTED TO THE COMPTROLLER OF THE NAVY. When an appropriation warrant has not been issued, the head of the responsible office is authorized by the Comptroller of the Navy to take the same actions under ANTICIPATED appropriations, for which he is responsible, WITHIN THE AUTHORIZATION CONTAINED IN ANY CONTINUING RESOLUTION ADOPTED BY THE CONGRESS PENDING THE PASSAGE OF THE APPROPRIATION ACT under which the appropriation warrant will be issued. Upon issuance of the approved budget activity allocations pursuant to apportionment, THE LIMITATIONS OF SUCH ALLOCATIONS WILL APPLY TO ALL SUBALLOCATION AND ALLOTMENT ACTION TAKEN PRIOR TO THE RECEIPT OF SUCH BUDGET ACTIVITY ALLOCATIONS.

(Emphasis added) (MOTION PAPERS 2 at tab 2)

58. In opposition to Cessna's motion for summary judgment, and in support of its cross-motion for summary judgment, the Navy furnished a declaration from the head of the Resource Allocation Branch, Office of the Comptroller, Department of the Navy (NAVCOMPT). This individual had been employed by the Government in various capacities for over 32 years. He had been 'the primary action officer for the apportionment policy, procedures, and operations for the entire Department of Defense (Army, Navy, Air Force, and Defense Agency appropriations.)' His declaration stated, inter alia:

4. The Department of the Navy (DON) is required to submit apportionment requests to the Office of the Secretary of Defense (OSD) within five days of PASSAGE OF AN APPROPRIATIONS ACT (DOD Budget Guidance Manual 7110-1-M, Part IV, Page 412-5 (attachment 1)). There are no restrictions placed upon DON from issuing quarterly allocations prior to the beginning of the Fiscal Year so long as the allocation documents contain an express prohibition against incurring obligations prior to passage of an Appropriations Act or a Continuing Resolution, whichever becomes applicable. Any such allocations are subject to all provisions of such Act or Resolution.

5. Upon passage of an Appropriation Act, funds are immediately available for obligation (NAVCOMPT Manual, paragraph 022064) . . . The requirement for apportionment does not prohibit the obligation of funds prior to the apportionment action. Apportionment is intended to regulate the rate of obligations so as to prevent deficiency situations and the need for supplemental appropriations, and therefore only becomes a limitation upon approval. (In the absence of apportionment, the agency receiving the appropriation is not subject to apportionment.) 31 U.S.C., section 1513(b), requires that apportionment requests be submitted to OMB by OSD within 15 days after enactment of an appropriation. OMB has 30 days after enactment to issue the apportionment. Thus until apportionment is approved by OMB, no apportionment limitation exists. Until apportionment by OMB, the amounts requested by DON in its submittal to OSD are used as an internal limitation by NAVCOMPT. In its apportionment request, DON includes anticipated obligations during the initial days of the fiscal year, as well as amounts anticipated to be required for the remainder of the first quarter of the fiscal year.

6. Once funds are apportioned by OMB, whether under an Appropriations Act or a Continuing Resolution, the amounts apportioned, lump sum or time-phased (as in O&MN), are adhered to on all allocation documents issued by NAVCOMPT and the Chief of Naval Operations (CNO).

7 . OSD does NOT allocate appropriated funds to the DON. Such funds are available to the DON for obligation upon passage of enabling appropriation authority. OSD, like OMB, may choose to limit or regulate the rate of obligation and/or prohibit certain programs from being executed for various administrative/legal reasons. Any such limitation(s) are set forth in memoranda received from OSD which, in the case of O&MN, are entitled: 'Obligational Authority.' As with the Apportionment (DD-1105), upon receipt of higher level controls (OMB/OSD), these controls are adhered to. Prior to receipt, there is no restriction on the incurrence of obligations.

8. Continuing Resolutions appropriate an amount equivalent to the

annual appropriation without regard to the time period actually covered by the resolution. Thus, a continuing resolution does not limit the government to entering into contracts valid only for the duration of the resolution, but rather merely prohibits further new obligations after its expiration.

(Emphasis in original) (MOTION PAPERS 3, tab 2)

DECISION

Count I

On 1 October 1988, the President signed into law the DoD Appropriations Act for FY 1989. On that day, the contracting officer for the 0090 contract issued Modification No. P00027 exercising the 3-year option under the contract. It is undisputed that the funds appropriated by the Act were not apportioned by OMB until 20 October 1988 (finding 55).

Cessna moves for summary judgment on Count I, contending that the contracting officer's exercise of the option was ineffective. Cessna alleges that the contracting officer violated 31 U.S.C. sec. 1517(a)(1) (an apportionment statute) (see finding 33), DoD Directive 7200.1 (implementing directive issued pursuant to 31 U.S.C. sec. 1514(a)) (see findings 47-49) and various paragraphs of the Navy Comptroller Manual (see findings 52-53) because she issued Modification No. P00027 obligating FY 1989 funds for the first year of the 3- year option period prior to apportionment and allocation of FY 1989 funds (MOTION PAPERS 1 at 24-28).

The Navy opposed Cessna's motion and crossed-moved for summary judgment on Count I.

Summary judgment is appropriate where the material facts are undisputed and the movant is entitled to judgment as a matter of law. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

No material facts are in dispute in Count I. Disposition of Count I turns on a question of law: whether there was any legal prohibition against obligation of funds appropriated prior to allocation of such funds by DoD.

We begin our analysis by comparing 31 U.S.C. sec. 1341 (the Antideficiency Act) with 31 U.S.C. sec. 1517, the principal apportionment statute upon which Cessna relies for its summary judgment motion on Count I. 31 U.S.C. sec. 1341 contains a two-prong prohibition: it prohibits a government employee from obligating funds 'exceeding an amount available in an appropriation,' and it prohibits a

government employee from obligating funds 'before an appropri- ation is made unless authorized by law.' 31 U.S.C. sec. 1341(b)(1)(A) and sec. 1341(b)(1)(B). The apportionment statute, in contrast, prohibits only obligation of funds 'exceeding - (1) an apportionment; or (2) the amount permitted by regulations prescribed under Section 1514(a) (Emphasis added) 31 U.S.C. sec. 1517. We cannot conclude from a plain reading of 31 U.S.C. sec. 1517 that it prohibits obligation of funds appropriated after the beginning of a new fiscal year prior to apportionment by OMB. Nor are we able to reach the conclusion that Cessna has urged upon us from a reading of the rest of the apportionment statutes.

We have also reviewed the various regulations to which Cessna directed our attention, namely, OMB Circular No. A-34 (see finding 54), DoD Directive 7200.1, pars. G and K (see findings 49 and 50), and the Navy Comptroller Manual (NCM) pars. 023004, 073002 (see findings 52 and 53). While the regulations and directives cited clearly prohibit obligation of funds in excess of appropriation or apportionment amounts, none has squarely addressed or prohibited obligation of funds appropriated after the beginning of a new fiscal year prior to OMB apportionment.

Indeed, the only instruction directly on point -- NCM par. 022064 -- clearly provides to the contrary. NCM par. 022064 is entitled 'AVAILABILITY OF FUNDS PRIOR TO APPORTIONMENT' (emphasis added). It applies 'After the beginning of the fiscal year and prior to the specific allocation of funds pursuant to apportionment.' It allows the head of the responsible office to suballocate funds and to issue allotments not exceeding the apportionment and allocation requests initially submitted to the Comptroller of the Navy (finding 57). To us, when funds are 'available,' they are available for obligation.

NCM par. 022064 fits neatly into 31 U.S.C. sec. 1513 of the apportionment statutes, brought to our attention by the Navy. In cases where an appropriation law is enacted after the beginning of a fiscal year, as in this case, 31 U.S.C. sec. 1513(b)(1)(B) requires the head of each executive agency to submit to the President (and hence OMB) apportionment information '15 days after the date of enactment of the law by which the appropriation is made available.' Under sec. 1513(b)(2)(B), OMB has '30 days after the date of enactment of the law by which the appropriation is made available' to take apportioning action. (See finding 56) In this case, since the DoD Appropriation Act for FY 1989 was signed into law on 1 October 1988, OMB had until 31 October 1988 to take apportionment action.

Cessna argues that 'the time tables set forth in sec. 1513 . . . do not sa that an agency is freed of apportionment requirement; they only identify the latest date by which funds must be apportioned' (MOTION PAPERS 3 at 22). We agree with Cessna that apportionment of appropriated funds

is a legal requirement mandated by 31 U.S.C. sec. 1517 (see finding 33), and no agency is free from that requirement. The Navy has not argued that it is exempt from the apportionment requirement. Cessna's argument, however, does not address the legal question before us. The narrow question before us, again, is whether the Apportionment statutes (31 U.S.C. sec. 1511 to sec. 1519) prohibit obligation of funds appropriated after the beginning of a new fiscal year (after 1 October) prior to apportionment of such funds by OMB. We believe if Congress had intended a blanket prohibition in obligating preapportioned funds it would have unqualifiedly said so, as in 31 U.S.C. sec. 1341(a)(1)(B) (see finding 33). It has not done so.

Furthermore, 31 U.S.C. sec. 1513(b)(1)(B) providing for a 15-day period fo submission by an agency of apportionment information to the OMB, and 31 U.S.C. sec. 1513(b)(2)(B) providing for a 30-day period for OMB apportioning action 'after the date of enactment of the law by which the apportionment is available, do not apply solely to situations where an appropriation act is enacted BEFORE the beginning of a new fiscal year. These statutory provisions are broad enough to cover situations where an appropriation act is enacted into law AFTER the beginning of a new fiscal year. Where an appropriation act is enacted after the beginning of a new fiscal year, we believe it is unreasonable to read the apportionment statutes to require the Government to halt all contractual actions when OMB takes its statutorily alloted time to discharge its apportionment duties. A more reasonable interpretation is to allow the Government the flexibility of obligating funds subject to certain limitations as to amount in anticipation of eventual completion of apportionment action. We conclude that there is no statutory prohibition against this flexibility.

Statutes should be construed so that their provisions are harmonious with each other. See 2B N. Singer, Sutherland Statutory Construction sec. 53.01 at 229 (5th ed. 1992). Our interpretation of 31 U.S.C. sec. 1513 fit neatly into the statutory scheme of the Apportionment statutes, giving due consideration to the unavoidable transition necessities from one fiscal year to another. Cessna's interpretation ignores 31 U.S.C. sec. 1513, and if applied, could wreak havoc on all contract actions at the beginning of each fiscal year.

Cessna argues that the Navy's position that 'only obligations in excess of apportioned amounts are prohibited' is 'facially absurb [sic],' because it 'would permit an agency to obligate the entirety of its appropriated funds at the outset of a fiscal year, so long as those funds have not yet been apportioned,' thus frustrating the purposes of the Apportionment statutes (MOTION PAPERS 3 at 22).

The short answer to this argument is that internal Navy controls, already in place, would prevent the occurrence of such a scenario. Paragraph

022064 of the NCM limits availability of appropriated funds prior to apportionment to 'such amounts as will not exceed the amount contained in . . . the request for apportionment and allocation submitted to the Comptroller of the Navy' (finding 57). Unchallenged declaration from a competent Navy funding official established that:

5. . . . Until apportionment by OMB, the amounts requested by DON in its submittal to OSD are used as an internal limitation by NAVCOMPT. In its apportionment request, DON includes anticipated obligations during the initial days of the fiscal year, as well as amounts anticipated to be required for the remainder of the first quarter of the fiscal year.

(Finding 58) Thus, proper safeguard has long since been put in place for potential abuses.

Cessna argues that 31 U.S.C. sec. 1513(B)(2) 'can by no reasonable interpretation be intended to suggest that prior to the President having taken the acts which he is required to take . . . that everybody subordinate to him can take their acts which are predicated on his acts' (oral arg., tr. 137-38). This argument is premised on the legal conclusion that there is a prohibition against obligation of appropriated funds prior to apportionment of such funds. We disagree with Cessna's legal conclusion.

Reading the various Apportionment statutes together and in harmony with each other, and taking into consideration the various implementing directives and regulations, we conclude that at the beginning of a new fiscal year 'after the date of enactment of the law by which the appropriation is made available,' the Navy is not prohibited, as a matter of law, from obligating funds prior to apportionment.

We conclude that, at the beginning of a new fiscal year, there was also no prohibition against obligating funds appropriated prior to allocation of funds by DoD. The declaration of a competent official from the Office of the Comptroller of the Navy stated that "OSD [Office of the Secretary of Defense] does not allocate appropriated funds to the DON. Such funds are available to the DON for obligation upon passage of the enabling appropri- ation authority.' This practice was clearly in compliance with NCM par. 022064 pursuant to which funds were available 'AT THE BEGINNING OF THE FISCAL YEAR AND PRIOR TO THE SPECIFIC ALLOCATION OF FUNDS PURSUANT TO APPORTIONMENT' (emphasis added). As in the case of obligation of appropriated funds prior to apportionment by OMB, obligation of funds prior to DoD allocation was limited by the amount contained in the budget request initially submitted to the Comptroller of the Navy. None of the regulations Cessna relied upon addressed the unique funding obligation situations at the beginning of a fiscal year, as to which we

have determined the funding statutes when read as a whole, allowed.

For the foregoing reasons, we conclude that the option exercise is not rendered ineffective by obligation of appropriated funds prior to OMB apportionment and prior to DoD allocation of such funds.

Moreover, the contracting officer was not contractually required to wait until appropriated funds became available before she could exercise the option. The 0090 contract included the 'Availability of Funds' clause. This clause permits the contracting officer to exercise the option when 'Funds are not presently available for this procurement' (see finding 8). See United Food Services, Inc., ASBCA No. 43711, 92-_ BCA par. __.

Accordingly, Cessna's motion for summary judgment on Count I is denied. The Navy's cross-motion for summary judgment on Count I is granted.

DECISION

Count XIII

Pursuant to the requirement of Section H-8 of the 0090 contract (finding 7), the contracting officer issued Modification No. P00038 on 1 October 1990 notifying Cessna of the availability of funds for performance of the Third Option Year of the contract during FY 1991.

At the beginning of FY 1991, the Government, including the Navy, was operating under two Continuing Resolutions: one signed into law by the President on 1 October 1990, and the second signed into law on 9 October 1990 (findings 20 and 21). The DoD Appropriations Act for FY 1991 was enacted into law on 5 November 1990 (finding 23).

As part of Count XIII, Cessna alleges at par. 90 of its complaint:

90. Modification No. P00038 purportedly obligated funds for contract performance in FY 1991. Upon information and belief, the contracting officer issued Modification No. P00038 before FY 1991 appropriations were apportioned by OMB, allocated by DOD, and/or suballocated by the Navy, in violation of 31 U.S.C. sec. 1511 - 1519 and regulations thereunder. Accordingly, the contracting officer's purported notice of funds availability for FY 1991 was therefore unlawful, invalid, and of no force or effect.

Even though the legal issue (obligation before apportionment) involved in Count XIII is the same as that in Count I, Cessna did not initially move for summary judgment on Count XIII 'because the date on which the third option year funds were apportioned has not yet been established' (see MOTION PAPERS 3 at 21, n. 7). The Navy has moved for summary judgment contending that the date of apportionment is legally 'Immaterial' (see MOTION PAPERS 2 at 72). Cessna later amended its motion for partial summary judgment and cross-moved for summary

judgment of Count XIII (MOTION PAPERS 6).

There is no issue with respect to the fact that apportionment of FY 1991 appropriation was performed by OMB after the DOD Appropriations Act was enacted into law on 5 November 1990. Pursuant to the Board's 29 December 1992 letter, the Navy forwarded a copy of the DD Form 1105R showing that the Deputy Associate Director for National Security Division, OMB, apportioned the FY 1991 DoD appropriation on 14 November 1990. As in Count 1, disposition of Count XIII turns on a question of law: whether there was a legal prohibition against obligation of funds appropriated at the beginning of a new fiscal year (after 1 October) prior to apportionment of such funds by OMB and prior to allocation of such funds by DoD. It is not disputed that the contracting officer notified Cessna of the availability of funds for the Third Option Year on 1 October 1991, prior to OMB apportionment of the FY 1991 DoD Appropriations Act enacted into law on 5 November 1991.

On Count I, we concluded that, at the beginning of a new fiscal year (in this case FY 1991), 'after the date of enactment of law by which the appropriation is made available,' the Navy is not prohibited, as a matter of law, from obligating funds for the purpose of exercising the 3-year option. We reach the same conclusion here. In this case, when the contracting officer issued Modification No. P00038, notifying Cessna of the availability of funds for the Third Option Year, the Navy was operating under the first of the two Continuing Resolutions for FY 1991. There was and is no requirement for apportionment of funds appropriated by way of a Continuing Resolution. NCM par. 022064, AVAILABILITY OF FUNDS PRIOR TO APPORTIONMENT,' covers the situation:

When an appropriation warrant has not been issued, the head of the responsible office is authorized by the Comptroller of the Navy to take the same actions under anticipated appropriations, for which he is responsible, WITHIN THE AUTHORIZATION CONTAINED IN ANY CONTINUING RESOLUTION ADOPTED BY THE CONGRESS PENDING THE PASSAGE OF THE APPROPRIATION ACT UNDER WHICH THE APPROPRIATION WARRANT WILL BE ISSUED.

(Emphasis added) (Finding 57)

We conclude that the Navy's notification of availability of funds for the Third Option Year (Modification No. P00038) is not rendered ineffective by reason of the fact that it was issued prior to apportionment and allocation of funds appropriated for FY 1991.

Accordingly, the Navy's motion for summary judgment on Count XIII is granted. Cessna's cross motion for summary judgment is denied.

Count II

Additional Findings of Fact

59. The 0090 contract was entered into pursuant to the authority of 10 U.S.C. sec. 2306(g) which provides, in part, as follows:

(g)(1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated

* * *

(C) specialized training necessitating high quality instructor skills (for example, pilot and other aircrew members; foreign language training); and whenever he finds that:

(i) there will be a continuing requirement for the services consonant with current plans for the proposed contract period;

(ii) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

* * *

(2) In entering into such contracts, the head of the agency shall be guided by the following principles:

(A) The portion of the cost of any plant or equipment amortized as a cost of contract performance should not exceed the ratio between the period of contract performance and the anticipated useful commercial life of such plant or equipment. Useful commercial life, for this purpose, means the commercial utility of the facilities rather than the physical life thereof, with due consideration given to such factors as location of facilities, specialized nature thereof, and obsolescence.

(B) CONSIDERATION SHALL BE GIVEN TO THE DESIRABILITY OF OBTAINING AN OPTION TO RENEW THE CONTRACT FOR A REASONABLE PERIOD NOT TO EXCEED THREE YEARS, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.

(C) Consideration shall be given to the desirability of reserving in the agency the right, upon payment of the unamortized portion of the cost of the plant or equipment, to take title thereto under appropriate circumstances.

(3) In the event funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from

(A) appropriations originally available for the performance of the contract concerned;
(B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or
(C) funds appropriated for those payments.

(Emphasis added)

DECISION Count II

Among the provisions of the Antideficiency Act, 31 U.S.C. sec. 1341(a)(1)(B) prohibits an employee of the United States from involving 'the government in a contract or obligation for the payment of money before an appropriation is made UNLESS AUTHORIZED BY LAW' (emphasis added; see finding 32). Cessna moves for summary judgment of Count II contending that the contracting officer's exercise of the 3-year option (Modification No. P00027) was ineffective and in violation of 31 U.S.C. sec. 1341(a)(1)(B) because, at the time of the option exercise (1 October 1988), no funds had been appropriated for the Second and the Third Option Years (FY 1990, 1991). (MOTION PAPERS 1 at 29-35)
The Navy opposed Cessna's motion and cross-moved for summary judgment in its favor. The Navy contends that funding the Second and Third Option Years with FY 1990 and 1991 appropriations was authorized by 10 U.S.C. sec. 2306(g) (MOTION PAPERS 2 at 49-51).
Summary judgment is appropriate where the material facts are undisputed and the movant is entitled to judgment as a matter of law. Mingus, 812 F.2d at 1391. No material facts are in dispute in Count II. Disposition of this count turns on the legal question of whether the Navy was authorized by law to fund the 3-year option of a multiyear contract with annual appropriations for the applicable fiscal year. The answer to this question involves the legal interpretation of 10 U.S.C. sec. 2306(g).
To understand 10 U.S.C. sec. 2306(g), we start with the so-called 'Wake Island' case reported at 42 Comp. Gen. 272 (1962). In that case, the Air Force awarded a 3-year requirements-type contract for services and supplies incident to landings of Government aircraft on the island. The contract was structured so that 'calls' for services and supplies would be paid out of then fiscal year funds. Since no calls would be made in any given year without available funds for that year, the Air Force considered that no obligation in advance of or in the absence of the appropriation of funds would occur. Sometime after award, the General Accounting Office (GAO) questioned the Air Force's authority in committing the Government to a contract for a period extending beyond the end of the fiscal year for which the appropriation [O & M, Air Force, funds

contained in the Department of Defense Appropriation Act, 1962, Public Law 87- 144, 75 Stat. 365, 369) was made.

In response to GAO's inquiry, the Air Force furnished the following justifications for its 3-year contract commitment:

'1. The Contracting Officer shall issue orders for services hereunder which shall set forth the services to be performed during the period covered by the order. The Contractor shall not perform services in excess of the amount set forth in each order.'

Under this [contract] language, the only obligation of the Government is to order from the contractor such requirements as the Government may have-that is, not to deal with another for the filling of the Government's requirements. The Government need not have require- ments. Such a situation might occur if no funds were made available to the Air Force for this type of service; it might occur if the Air Force determined that the services were unnecessary for operational or other reasons; it might occur even if the Air Force had funds available for this type of services but chose not to expend them for the services covered by this contract at this base, so long as the Air Force acted in good faith in making such a decision and did not attempt to eliminate the requirement for services from this contractor just for the purpose of obtaining substantially the same services from another company.

As indicated above, the Government does have an obligation under this contract, and this obligation is sufficient to meet the essential mutuality requirement for the existence of a contract. But the obligation is limited; it is a negative one, that the Government will not deal with another. It does not obligate the Government to procure from the contractor. The commitment can be satisfied without the expenditure of funds and thus needs no appropriation. It obligates no appropriation. Such commitments have not been construed as requiring or permitting the recording of an obligation under Section 1311, P.L. 663, 83rd Congress, 31 U.S.C. 200, until an order under the contract is issued . . . .

* * *

In the specific case of the contract for services at Wake Island, we are satisfied that the proper facts are present. The extremely isolated position of the facility to be operated, the difficult procurement and logistics problems thereby posed for the contractor in terms of equipment, supplies, and personnel, and the difficulties of transition of the work from one contractor to another, leading to losses in performance and money for both the contractor and the Government, weigh heavily for an extended term contract. Each new contractor must expect and provide for the amortization of substantial starting load and learning costs, more

appropriately distributed over a period longer than one year. Under a rigid one year contract system, a successful bidder in one year may be expected to amortize such costs in full in the first year; on subsequent procurements, the in-place contractor has a substantial cost advantage over the bidder who must provide anew for such costs, and little of this cost advantage may be expected to accrue to the Government.

42 Comp. Gen. at 273-74.

The GAO concluded that the Wake Island contract went beyond the authority conferred by the FY 1962 DoD Appropriation Act at the time of its execution and was entered into in violation of 41 U.S.C. sec. 11 and 31 U.S.C. secs. 665(a), 712a. [FN5]The GAO stated that 'authority for such action [making extended term contracts] is a matter for consideration by the Congress and may not be accomplished indirectly by a pattern of contracting which seeks to make use of requirements contracts extending beyond the current fiscal year to meet such situations.' 42 Comp. Gen. at 278.

To overcome the result of the 'Wake Island' case, legislation was introduced in Congress to amend the then existing 10 U.S.C. sec. 2306 to authorize multiyear contracting for certain specified types of services and supplies related to such services. The resulting statute was enacted into law as a whole on 5 July 1968 (Pub. L. 90-378, 82 Stat. 289) and was codified at 10 U.S.C. sec. 2306(g) 6/.

Section 2306(g) is in three subsections: Subsection (1) authorizes the head of an agency to enter into multiyear contracts 'for periods of not more than five years' for certain specified types of services and supplies related to such services. The head of the agency is required to make a finding that 'furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force.' [Subsection (1) shall at times be referred to in this opinion as the 'Multiyear Authorization Provision' of sec. 2306(g)] Subsection (2)(B) requires the head of the agency to be guided by three principles in entering into multiyear contracts. One of these principles states that '(B) Consideration shall be given to the desirability of obtaining an option to renew the contract for a reasonable period not to exceed three years, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.' [This subsection shall at times be referred to in this opinion as the 'Option Provision' of sec. 2306(g)] Subsection (3) specifies the sources from which cancellation or termination costs of multiyear contracts may be paid.

The legislative history of sec. 2306(g) indicates clearly that multiyear contracts are authorized so that contractors can spread their initial costs

over the entire contract term:

The Wake Island case is illustrative of the difficulties faced by the military departments in certain procurements. In Wake Island extensive machinery and equipment, as well as personnel, had to be transported to a remote area at considerable expense to the contractor. If the contractor were required to rely exclusively on a 1-year contract, his contract price would have to cover all these expenses. However, once having been awarded the contract, in subsequent years he would be in a position to underbid any competitors, who would be obligated to include in their bid prices, their initial costs of obtaining and transporting equipment, and personnel. As a result of the initial 1-year contract, competition would thereafter be reduced, and the Government might be overcharged in subsequent years. The other alternative of prospective bidders - buying in - by offering a price lower than expected costs in an attempt to recover losses in follow-on contracts - is undesirable both to prospective bidders and to the Government. Competition should be based upon sound business considerations, not upon speculations as to future contracts.

If 3- or 5- year contracts could be awarded instead, contractors could spread initial costs over the entire contract term and provide the Government sustained quality performance from year to year. In similar procurements not limited by dependence upon annual appropriations, multiyear contracts have effected cost savings both in contract price and in the cost of contract administration.

S. Rep. No. 1313, 90th Cong., 2d Sess. 2 (1968) (see MOTION PAPERS 3 at tab
54).

In enacting sec. 2306(g), Congress relied on a number of precedents. As reflected in the legislative history of sec. 2306(g), Congress relied upon 42 U.S.C. sec. 2201(u)(2) which authorized the Atomic Energy Commission (AEC) to enter into 5-year contracts for supplies and services requiring special facilities, the amortization of which constituted an appreciable part of the contract costs. Also cited in the sec. 2306(g) legislative history as an example was the Federal Property and Administrative Services Act of 1949 (40 U.S.C. sec. 481(a)(1)) which gave the Administrator of General Services authority to contract up to 10 years for public utility services. S. Rep. No. 1313, 90th Cong., 2d Sess. 2 (1968) (MOTION PAPERS 3 at tab 54).

In drafting sec. 2306(g), Congress, pursuant to a GAO recommendation (GAO letter of 15 July 1965, MOTION PAPERS 3 at tab 41) used the then existing 42 U.S.C. sec. 2201(u) (applicable to the AEC) as a guide. 42 U.S.C. sec. 2201 (provides:

(B) In entering into such contracts the Commission shall be guided by

the following principles: (i) the percentage of the total cost of special facilities devoted to contract performance and chargeable to the Commission should not exceed the ratio between the period of contract deliveries and the anticipated useful life of such special facilities; (ii) THE DESIRABILITY OF OBTAINING OPTIONS TO RENEW THE CONTRACT FOR REASONABLE PERIODS AT PRICES NOT TO INCLUDE CHARGES FOR SPECIAL FACILITIES ALREADY AMORTIZED; and (iii) the desirability of reserving in the Commission the right to take title to the special facilities under appropriate circumstances;

(Emphasis added)

The legislative history of sec. 2306(g) itself provides no insight as to the purpose of its Option Provision. In light of evidence indicating that the sec. 2306(g) option provision was 'borrowed' from 42 U.S.C. sec. 2201(u), Cessna contends that it is proper to look to the legislative history of 42 U.S.C. sec. 2201(u) to determine the purpose of the Option Provision in entering into sec. 2306(g) multiyear contracts. The legislative history of 42 U.S.C. sec. 2201(u) provides the following insight with respect to the purpose of its option provision:

In the normal instance, it would appear desirable, as a part of good contracting practice, to include such options in order to obtain the materials, if still needed in the Commission's program, for a similar additional period or periods after the special facility has been completely or partially amortized, and therefore normally at a lower price to the Commission.

H.R. Rep. No. 2272, 85th Cong., 2d Sess., reprinted in 1958 U.S.C.C.A. N. 3598,
3605.

We have ventured into the legislative history of sec. 2306(g) and 42 U.S.C sec. 2201(u) because Cessna's argument for different funding treatment of the base contract period and the 3-year option period of the 0090 contract centers upon the different underlying purposes of the Multiyear Authorization Provision and the Option Provision of sec. 2306(g).

It is clear from an examination of the legislative history of sec. 2306(g) that the overriding purpose for authorizing multiyear contracts for the kind of services called for in the 0090 contract is to enable a contractor to amortize its investment over the duration of the multiyear contract, up to 5 years. It is also clear that the purpose for authorizing the Government to extend a multiyear contract by options, or as in this case by an option, is to enable the Government to benefit from a lower contract price.

Cessna concedes that under sec. 2306(g), the Navy was authorized to fund the 5-year base contract period with annual appropriations. Cessna contends that because the purpose of the Option Provision is different from the purpose of the Multiyear Authorization Provision, the 3-year option period of the 0090 contract was not exempt from the antideficiency prohibition of 31 U.S.C. sec. 1341(a)(1)(B). Cessna suggests that the Navy could have avoided the funding problem it now faces by structuring the 0090 contract to provide for three individual one-year options "each of which may be exercised after appropriated funds for the corresponding fiscal year have been made available.' Cessna argues that 'Agencies choosing to include a three year option in sec. 2306(g) contracts are therefore required by 31 U.S.C. sec. 1341(a)(1)(B) to ensure that the option is not exercised before funds have been appropriated for the entire three year period.' (MOTION PAPERS 1 at 33 to 34)

We are not persuaded by Cessna's argument. The different purposes for including the Multiyear Authorization Provision (10 U.S.C. sec. 2306(g)(1)) and the Option Provision (10 U.S.C. sec. 2306(g)(2)(B)) do not compel a conclusion that the option period of a multiyear contract must be funded differently.

Although the text of sec. 2306(g) does not detail how sec. 2306(g) contrac would be funded, the legislative history of sec. 2306(g) provides the following guidance:

It is contemplated that if this proposed legislation is enacted, the same funding arrangements would be established as are now applied in connection with multiyear procurement using no-year appropriations as approved by the Comptroller General. While the liability under the contract would cover periods beyond the end of the fiscal year, funds would only be obligated in any one year against the then current appropriation to cover the value of goods and services to be delivered or performed during the applicable year.

S. Rep. No. 1313, 90th Cong., 2d Sess. 2 (1968) (MOTION PAPERS 3 at tab 54).

We assume that in enacting sec. 2306(g), Congress was aware that a 5-year contract might, by virtue of an exercise of an option plainly authorized by the same law, result in a contract running for as long as eight years. Yet, in explaining how a sec. 2306(g) contract is to be funded, Congress drew no distinction between the base multiyear contract period and the option period. It unqualifiedly said that the 'same funding arrangements would be established as are now applied in connection with multiyear procurement using no-year appropriations,' and that 'funds would only be obligated in any one year against the then

current appropriation to cover the value of goods and services to be delivered or performed during the applicable year.' Absent any expression of a contrary intent, we conclude that Congress intended that a sec. 2306(g) contract, including its option period, is authorized to be funded with the then current appropriations.

Furthermore, even though the Navy could have structured the 0090 contract to provide for three individual option years, structuring the contract to provide for one option for three years was, in our view, well within the bounds permitted by the Option Provision of sec. 2306(g). That provision states, 'Consideration shall be given to the desirability of obtaining an option to renew the contract for A reasonable PERIOD not to exceed three years' (emphasis added) 10 U.S.C. sec. 2306(g)(2)(B).

It is a principle of statutory interpretation that when 'A statute is passed as a whole and not in parts or sections . . . each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.' This principle has also been stated in another way: 'a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole.' See 2A N. Singer, Sutherland Statutory Construction sec. 46.05 at 103 (5th ed. 1992).

As reflected in its legislative history, the overriding legislative purpose in enacting sec. 2306(g) to amend 10 U.S.C. sec. 2306 was to overcome t Wake Island decision so as to permit multiyear contracting of services. The Option Provision was a subsidiary provision included in sec. 2306(g) as a result of using 42 U.S.C. sec. 2201(u) as a drafting guide. Section 2306(g) was enacted into law as a whole on 5 July 1968. See Pub. L. 90-378, 82 Stat. 289. An option when exercised, becomes merely an extension of an existing contract. See DAR 1- 1501. Cessna concedes that the Navy had the choice of structuring the 0090 contract option as one option for three years. To have that choice given by sec. 2306(g), and to say that it could only be validly exercised by reverting to a funding scheme sec. 2306(g) was enacted to over- come, is to read sec. 2306(g) inharmoniously, and to ignore the overriding purpose in enacting sec. 2306(g). Cessna's interpretation would render in- effective the exercise of an option for 3-years, plainly permitted by the Option Provision of sec. 2306(g), unless the funding scheme designed to permit the use of multiyear service contracts is abandoned. It is our view that Cessna's construction is unreasonable.

We conclude, therefore, that funding the Second and Third Option Years with FY 1990 and 1991 appropriations rather than the DoD FY 1989 appro- priation was authorized by law and not in violation of 31 U.S.C. sec. 1341(a)(1)(B). It follows that the contracting officer's exercise of the option was not in violation of 31 U.S.C. sec. 1341(a)(1)(B) and therefore not ineffective.

Accordingly, Cessna's motion for summary judgment of Count II is denied. The Navy's cross motion for summary is granted.

Count III

Additional Findings of Fact

60. The Navy Comptroller Manual defines 'commitment' of appropriated funds as follows:

022071 DEFINITIONS RELATING TO TRANSACTIONS

* * *

2. COMMITMENTS. A commitment is a firm administrative reservation of funds, based upon firm procurement directives ' orders, requisitions, authorizations to issue travel orders, or requests which authorize the recipient to create obligations without further recourse to the official responsible for certifying the availability of funds.

(MOTION PAPERS 1 at tab 42) There is a distinction between 'commitment' of appropriated funds and 'obligation' of those funds. Cessna acknowledged during oral argument that while funds are 'committed' by the Office of the Comptroller of the Navy, funds committed are 'obligated' by a procurement contracting officer (oral arg., tr. 32).

61. A procurement contracting officer plays no direct role in making appropriated funds available for obligation. That role belongs to the Comptroller of the Navy. (Nyce depo. at 31, MOTION PAPERS 1 at tab 27) The Office of the Comptroller of the Navy is set up to support various Navy program offices (Beckner depo. at 17-18, MOTION PAPERS 1 at tab 26). When appropriated funds are made available, they are obligated by a contracting officer. A contracting officer, however, cannot obligate funds without a funding sheet signed by an authorized individual from the Office of the Comptroller of the Navy (Nyce depo. at 35, MOTION PAPERS 1 at tab 27). One of the documents that certifies the availability of funds for obligation is a Financial Accounting Data (FAD) Sheet. The FAD Sheet is signed by an authorized individual in the Office of the Comptroller of the Navy. It gives the contracting officer the funding authority to proceed with contract actions, and it serves as authorization for 'the paying office . . . to cut checks, make disbursements.' (Beckner depo. at 17-18, MOTION PAPERS 1 at tab 26)

DECISION

Count III

A FAD sheet or DD Form No. 1140 was used by the Office of the Comptroller of the Navy to commit appropriated funds. On 30 September 1988, the last day of FY 1988, a budget analyst of that office, signed a FAD Sheet, post dated it 1 October 1988, committing $22,576,253 to the 0090 contract. The FAD Sheet was executed with the proviso that 'EXECUTION OF THIS DOCUMENT IS CONTINGENT ON CONGRESSIONAL PASSAGE OF THE FY-89 APPROPRIATION ACT OR OTHER AUTHORITY.'

On 1 October 1988, the first day of FY 1989, the President signed into law the Defense Appropriation Act, 1989, Pub. L. No. 100-43, 102 Stat. 2270 (1988) (FY 1989 DoD Appropriation Act). Sometime on 1 October 1988, the contracting officer issued Modification No. P00027, exercising the 3-year option provided by the 0090 contract. Among the papers sent by facsimile to Cessna was the FAD Sheet.

There is no dispute that before she sent the FAD Sheet to Cessna along with Modification No. P00027 exercising the option, the contracting officer whited- out the budget analyst's proviso with white correction fluid and redrew the whited-out vertical lines which had been on the FAD Sheet.

Cessna has charged that the contracting officer falsified an official funding document in violation of 'an array' of criminal statutes (MOTION PAPERS 1 at 38). In an earlier opinion, we struck allegations of criminal violations from the record on the basis that we have no jurisdiction over violations of criminal statutes. See Cessna Aircraft Co.. ASBCA No. 43196, 93-_ BCA par __.

Cessna moves for summary judgment of Count III contending that, until the Office of the Comptroller of the Navy issued an unqualified FAD Sheet commiting [sic] funds to the 0090 contract, the contracting officer had no authority to obligate funds to the contract. Thus, the argument follows, the contracting officer exercised the option in violation of various provisions of the Antideficiency Act. Cessna contends that it is entitled to summary judgment on Count III because the option exercise was ineffective.

The Navy opposed Cessna's motion and cross moved for summary judgment in its favor. The Navy contends that when the FY 1989 DoD Appropriation Act was signed into law on 1 October 1988, the condition under which the FAD Sheet was signed was removed, and therefore, there was no longer any statutory or regulatory impediment to obligating the funds already committed.

No materials facts are in issue. Resolution of the motions on Count III

turns on the question of whether the contracting officer could obligate appropriated funds without 'further recourse' to the Comptroller. Disposition of Count III by summary judgment is therefore, appropriate. Mingus, 812 F.2d 1391.

The heart of Cessna's argument is that the contracting officer had no authority to make funding determinations for the Navy Comptroller; that no appropriated funds could be obligated in the absence of an unqualified FAD Sheet issued by the Comptroller (MOTION PAPERS 3 at 35, 37). This argument blurs the clear distinction between commitment and obligation of appropriated funds.

To the extent Cessna is contending that the FAD Sheet proviso required the contracting officer to obtain an unqualified clearance from the Navy Comptroller (MOTION PAPERS 1 at 36-37), Cessna has misinterpreted the proviso. As evidenced by the clear language of the proviso, the Navy Comptroller's commitment of funds was contingent only on an event not within its control: 'Congressional passage of the FY-89 Appropriation Act or other authority (referring presumably to a continuing resolution).' The proviso clearly did not retain for the Comptroller any recourse or veto authority over the contracting officer's ability to obligate funds once they were appropriated.

If only an unqualified FAD Sheet could commit appropriated funds, the issuance of a FAD Sheet with a proviso served no useful purpose and made no sense. The budget analyst might just as well have waited for the enactment of the FY 1989 DoD Appropriation Act before committing any funds. It is obvious that in this case, the FAD Sheet was issued in anticipation of the passage of the FY 1989 DoD Appropriation Act. The FAD Sheet was self- executing; it became an unqualified commitment of funds for the 0090 contract upon signing into law of the FY 1989 DoD Appropriation Act on 1 October 1988. At that moment, with funds already committed, and with the limitations of funds commitment removed, the contracting officer was authorized to obligate funds for the disputed option.

Furthermore, the 0090 contract included the 'Availability Of Funds' clause (see finding 8). Under that clause, the contracting officer could exercise the 3-year option without funds first having been made available, or committed. United Food Services, Inc., ASBCA No. 43711, 93-_ BCA par. ___. We note parenthetically that, by the time Cessna became aware of the contents of Modification No. P00027 and the FAD Sheet on 3 October 1988 (finding 14), the FY 1989 DoD Appropriation Act had already been signed into law. Thus, had the Comptroller's proviso not been removed, it could even have been potentially misleading to Cessna 2/0.

We conclude, therefore, that the Navy's exercise of the 3-year option is

not rendered ineffective by reason of the altered FAD Sheet.

Accordingly, Cessna's motion for summary judgment of Count III is denied. The Navy's cross-motion for summary judgment of the same count is granted.

Count IV and Count X

Additional Findings of Fact

62. When the contracting officer issued Modification No. P00027 obligating funds for FY 1989, no funds were committed or obligated to cover the contingent cancellation liability of up to $29 million in the event services for the Second and Third Option Years were to be cancelled.

63. Similarly, when the contracting officer issued Modification No. P00034 notifying Cessna that funds were available for services to be performed during FY 1990, no funds were committed or obligated to cover the contingent cancellation liability of up to $26.5 million in the event services for the Third Option Year were to be cancelled.

64. Funds for the Cessna contract were made available to NAVAIR pursuant to a Request for Contractual Procurement, NAVCOMPT Form 2276 (see MOTION PAPERS 1 at tabs 22 and 36 for FYs 1989 and 1990).

65. Navy Comptroller Manual (NCM) par. 032010(3)(g) provides:

g. Violations of 31 U.S. Code 1517 (Formerly Part of Sec. 3679. R.S.) When commitments, obligations, or expenditures are made in excess of an authorization of funds and the provisions of subpar. b, c, d, e, or f are not applicable, a violation of 31 U.S. Code 1517 (formerly part of Sec. 3679 R.S.) will exist.

(MOTION PAPERS 1 at tab 24)

66. NCM par. 032010(2) defines the term 'authorization of funds' as follows:

2. DEFINITION. The term 'authorization of funds,' when used in this Section, means allotments, suballotments, operating budgets, technical operating budgets, direct cite authority and other obligational authority.

(MOTION PAPERS 1 at tab 24)

DECISION

Count IV and Count X

Cessna moves for summary judgment on Counts IV and X. The bases for its motion are set forth below:

The purported option exercise obligated the government to pay $22,576,253 for services in FY 1989. In addition, the option exercise

exposed the government to a contingent liability of up to $29 million of cancellation charges in the event the second [and third] option year[s] [were] cancelled. These commitments and obligations total over $50 million dollars and far exceed the $22,576,253 amount authorized by the NAVCOMPT Form 2276 for FY 1989. The purported option exercise, therefore, violated the Antideficiency Act and regulations promulgated thereunder, and Cessna is entitled to summary judgment on Count IV.

Similarly, the notice of funds availability for FY 1990 obligated the government to pay $23,282,519 for services in FY 1990. This continuation of the option through the second option year exposed the government to a contingent liability of up to $26.5 million of cancellation charges in the event the third option year was cancelled. The resulting commitments and obligations again total over $50 million and far exceed the $23,282,519 amount authorized by the NAVCOMPT Form 2276 for FY 1990. The modification and notice of funding availability authorizing Cessna to continue performance in the second option year, therefore, violated the Antideficiency Act and regulations promulgated thereunder, and Cessna is entitled to summary judgment on Count X.

(MOTION PAPERS 1 at 52-53)

The Navy opposed Cessna's motion and cross moved for summary judgment in its favor. The Navy contends that there was no legal requirement to fund contingent cancellation liabilities at the time it exercised the 3-year option, or at the time it notified Cessna of the availability of funds for performance of FY 1990 contract services.

No material facts are in issue. The question before us is whether there was a legal requirement to fund contingent cancellation liabilities for the option period of a sec. 2306(g) multiyear contract. Disposition of Count IV and Count X by summary judgment is therefore appropriate. Mingus, 812 F.2d at 1391.

Whether 'termination charges' in multiyear contracts should be funded was a subject of discussion before Congress in connection with the FY 1968 DoD Appropriation Bill. The following passage appears in H.R. Report No. 349, 90th Congress 1st Sess. 40-41 (1967):

One of the methods utilized by the Department of Defense to achieve economies in Defense procurement has been the use of multiyear contracts . . . . A feature of this program in the past has been the funding of potential termination charges in the initial request for appropriations. The charges would, of course, only be incurred in the event it was necessary for the Government to terminate the contract for reasons other than contractor liability. Little, if any, use has been made of these potential termination charges to date. As a result, they have been applied systematically to subsequent procurements with some reductions in total

appropriation requirements. THE GROWING USE OF THIS METHOD OF CONTRACTING HAS, HOWEVER, LED TO THE POTENTIAL OF TYING UP CONSIDERABLE SUMS OF MONEY FOR POTENTIAL TERMINATION CHARGES IN VARIOUS PROGRAMS. The Committee feels that, since the Government is basically a self-insurer and since this method of procurement contracting has proved itself as a proper and reliable means of procurement management THIS POLICY can be changed. Accordingly, it has deleted the funds requested for termination charges in multiyear contracts proposed to be initiated with funds approved in the fiscal year 1968 program. . . . Should termination charges be required at a later date for any of these programs, the Committee will cooperate with the Department of Defense in making such funds available.

(Emphasis added) (MOTION PAPERS 2 at tab 9)

A Government contract textbook made the following observations with respect to funding contingent liabilities:

A contract clause making the Government liable upon the occurrence of a remote event is said to create a 'contingent liability' for which no obligation need be recorded until the event has occurred. For example, in 42 Comp. Gen. 708 (1963) the Comptroller held that a clause in an aircraft rental contract which placed the risk of loss of the aircraft on the Government did not require an obligation of funds. The Comptroller stated at 712-13:

Where a clause of this nature is included in a contract there is always the possibility of payment thereunder being required. This bare possibility alone is not sufficient to require recognition thereof by establishment of a reserve, unless and until some circumstance arises from which it is apparent that a demand under the clause may be made. Cf. 37 Comp. Gen. 691.

* * *

. . . In contrast, a controversy arose over the PRACTICE in the Department of Defense of administratively reserving an amount of funds sufficient to cover possible cancellation charges under multi-year procurements. The department took the view that the obligation to pay cancellation charges, although contingent, represented a legal liability of the Government and that it could not allow the amount of available funds to fall below the amount of the Government's maximum liability. THIS PRACTICE TIED UP A SUBSTANTIAL AMOUNT OF FUNDS, PRECLUDING THEIR USE FOR OTHER PURPOSES. In 1967, the House Committee on Appropriations instructed the department not to

reserve funds for multi-year procurement cancellation charges in the future, H.R. Rep. No. 349, 90th Cong., 1st Sess. 41 (1967). The Committee, viewing the Government as a self-insurer, noted that should cancellation charges be required at a later date the Committee would cooperate with the Department of Defense in making funds available. Cf. 43 Comp. Gen. 657 (1964).

(Emphasis added); R. Nash & J. Cibinic, Federal Procurement Law at 67 2 (3rd.
ed. 1977).

It is clear that, historically, funding contingent liabilities in multiyear contracts had been a matter of policy or practice rather than a strict legal requirement. Congress has, since at least 1967, instructed DoD not to administratively reserve funds for multiyear procurement cancellation charges.

The most compelling reason for not requiring funding of contingent liabilities is that the multiyear procurement statute enacted into law in 1968 -- 10 U.S.C. sec. 2306(g)(3) -- implemented the Congressionally directed policy and specifically identified the sources from which cancellation or termination costs may be paid in the event of cancellation: '(A) appropriations originally available for the performance of the contract concerned; (B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or (C) funds appropriated for those payments.' (See finding 59) If cancellation charges had to be committed and obligated in advance, as Cessna has urged, sec. 2306(g)(3) would be superfluous. It is well settled that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous. See 2A N. Singer, Sutherland Statutory Construction sec. 46.06 (5th ed. 1992).

No authorities bearing directly on the application of sec. 2306(g)(3) have been cited to us. The Navy did, however, direct us to a GAO decision involving the application of an almost identical cancellation provision (except for the word 'property' underscored in note 8) -- 10 U.S.C. sec. 2306(h)(5) [FN8]-- involving the multiyear acquisition of weapon systems authorized under sec. 2306(h). In Comp. Gen. B-206570, April 26, 1982 (unpub.), the GAO noted that sec. 2306(h)(5) was recognition of the practice that contingent liabilities of multiyear contracts need not be funded:

Cancellation charges and ceilings traditionally have been contingent liabilities which became actual liabilities only in the event of contract cancellation. These liabilities also traditionally have not been funded. This practice is recognized by section 909 which does not require cancellation ceilings to be funded. See Section 2306(h)(5), as added to

Title 10 by section 909.

We agree with the GAO's conclusion. We conclude that sec. 2306(g)(3) containing almost identical language as sec. 2306(h)(5) should be similarly construed.

We note that the Federal Acquisition Regulation (FAR) prescribing policies and procedures for the acquisition of supplies and services through 'Special Contracting Methods,' including 'multi-year contracting' and 'options' is consistent with our construction of sec. 2306(g). FAR 17.103-1(f) provides:

(f) Funding/payment of cancellation charges. Cancellation charges need not be funded before cancellation. If cancellation occurs, the contractor is entitled to payment (see the clause at 52.217.2, Cancellation of Items).

When the Navy exercised the 3-year option, it simply extended the multiyear contract. As we pointed out before, this right was clearly authorized by statute (10 U.S.C. sec. 2306(g)(2)) and provided for by the terms of the 0090 contract. The distinction Cessna draws between the base period of a multiyear contract and the option period of the same contract is an intellectual exercise of no consequence. The reason for not requiring funding for potential cancellation charges was that such a requirement would otherwise tie up considerable sums of money precluding their use for other purposes. This reasoning would apply with equal force to the option period of a multiyear contract. No sound arguments have been advanced in support of the view that tying up funds is any more acceptable during the option period.

Furthermore, sec. 2306(g)(3) applies to situations where 'funds are not made available for the continuation of such a contract into a subsequent fiscal year.' It made no distinction between the base period of a multiyear contract and the option period of that same contract. We decline to read into the law a distinction that is not there.

We conclude that in exercising the option on 1 October 1988 (Modification No. P00027) and in issuing Modification No. P00034 on 1 October 1989, the Navy did not need to fund the contingent cancellation liabilities for FY 1989 ($29 million) and FY 1990 ($26.5 million). Such exemption was authorized by 10 U.S.C. sec. 2306(g)(3). There were therefore no violations of the Antideficiency Act (31 U.S.C. sec. 1341(a)(1)(A) & (B)).

Accordingly, Cessna's motion for summary judgment of Count IV and Count X is denied. The Navy's cross motion for summary judgment of the same counts is granted.

Count IX and Count XII

Additional Findings of Fact

67. Continuing Appropriations, 1990, Pub. L. 101-100, 103 Stat. 638, approved 29 September 1989, the FY 1990 Continuing Resolution,

provided in part, as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 1990, and for other purposes namely:

Sec. 101. (a) Such amounts as may be necessary for continuing projects or activities (not otherwise specifically provided for in this joint resolution) which were conducted in the fiscal year 1989 and for which appropriations, funds or other authority would be available in the following appropriations Acts:

* * *

The Department of Defense Appropriations Act, 1990, notwithstanding section 502(a)(1) of the National Security Act of 1947;

* * *

(b) APPROPRIATIONS MADE BY THIS SECTION SHALL BE AVAILABLE TO THE EXTENT AND IN THE MANNER WHICH WOULD BE AVAILABLE BY THE PERTINENT APPROPRIATIONS ACT.

* * *

Sec. 102. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until (a) enactment into law of an appro- priation for any project or activity provided for in this joint resolution, or (b) enactment of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 25. 1989. whichever first occurs.

See. 103. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

Sec. 104. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropri- ation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or

authorization is contained is enacted into law.

(Emphasis added)

68. At the beginning of FY 1991, the Government was operating under two Continuing Resolutions: Continuing Appropriations, 1991, Pub. L. 101-403, 104 Stat. 867, approved 1 October 1990, and Further Continuing Appropria- tions, 1991, Pub. L. 101-412, 104 Stat. 894. The first FY 1991 Continuing Resolution provided in part, as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 1991, and for other purposes, namely:

* * *

Sec. 103. Such amounts as may be necessary to continue existing programs and activities, which were conducted in fiscal year 1990, for which provision was made in the Department of Defense Appropriations Act 1990, but such activities shall be funded at not to exceed an annual rate for new obligation authority of $262,969,000,000, and this level shall be distributed on a pro rata basis to each appropriation account utilizing the fiscal year 1991 amended budget request as the base for such distribution and shall be available under the terms and conditions provided for in the applicable appropriations Acts for fiscal year 1990, notwithstanding section 502(a)(1) of the National Security Act of 1947:

* * *

Sec. 105 APPROPRIATIONS MADE BY SECTION 101, 102, 103 AND-104 SHALL BE AVAILABLE TO THE EXTENT AND IN THE MANNER WHICH WOULD BE PROVIDED BY THE PERTINENT APPROPRIATIONS ACT.

* * *

Sec. 108. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted to title I of this joint resolution shall be available until (a) enactment into law of an appro- priation for any project or activity provided for in this joint resolution, or (b) the enactment of the

applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 5. 1990. whichever first occurs.

Sec. 109. Appropriations made and authority granted pursuant to title I of this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

Sec. 110. Expenditures made pursuant to title I of this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.

(Emphasis added)

69. The second FY 1991 Continuing Resolution, approved 9 October 1990, provided in part, as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 1991, and for other purposes, namely:

* * *

Sec. 103. Such amounts as may be necessary to continue existing programs and activities, which were conducted in fiscal year 1990, for which provision was made in the Department of Defense Appropriations Act 1990, but such activities shall be funded at not to exceed an annual rate for new obligation authority of $265,369,000,000, and this level shall be distributed on a pro rata basis to each appropriation account utilizing the fiscal year 1991 amended budget request as the base for such distribution and shall be available under the terms and conditions provided for in the applicable appropriations Acts for fiscal year 1990, notwithstanding section 502(a)(1) of the National Security Act of 1947:

* * *

Sec. 105 APPROPRIATIONS MADE BY SECTION 101. 102. 103 AND 104 SHALL BE AVAILABLE TO THE EXTENT AND IN THE MANNER WHICH WOULD BE PROVIDED BY THE PERTINENT APPROPRIATIONS ACT.

* * *

Sec. 108. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until (a) enactment into law of an appropri- ation for any project or activity provided for in this joint resolution, or (b) the enactment of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) OCTOBER 19, 1990, whichever first occurs.

Sec. 109. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

Sec. 110. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropri- ation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.

(Emphasis added)

DECISION

Count IX and Count XII

The FY 1990 DoD Appropriations Act was not enacted into law until 21 November 1989 (finding 19). Since the beginning of that fiscal year (1 October 1989), the Government had been operating under a Continuing Resolution. The FY 1990 Continuing Resolution contained a funds availability cutoff date of 25 October 1989.

The FY 1991 DoD Appropriations Act was not enacted into law until 5 November 1991 (finding 23). Since the beginning of that fiscal year (1 October 1990), the Government had been operating under two Continuing Resolutions. The first Continuing Resolution contained a funds availability cutoff date of 5 October 1990. The second Continuing Resolution contained a funds availability cutoff date of 19 October 1990.

On 1 October 1989, while the Government was operating under the FY 1990 Continuing Resolution, the contracting officer issued Modification No. P00034, notifying Cessna that FY 1990 funds were available for performance of contract services for the Second Option Year.

On 1 October 1990, while the Government was operating under the first of the two Continuing Resolutions, the contracting officer issued Modification No. P00038, notifying Cessna that FY 1991 funds were

available for performance of contract services for the Third Option Year. These two notification modifications were sent to Cessna prior to the funding or budget authority cutoff dates of the Continuing Resolutions involved.

Cessna moves for summary judgment of Count IX and Count XII contending that the notifications of availability of funds were ineffective to continue the 0090 contract into the Second and Third Option Years because the contracting officer violated the Antideficiency Act (31 U.S.C. sec. 1341(a)(1)(A) & (B)) in obligating the Navy to an entire fiscal year of contract services -- FY 1990 (Count IX) and FY 1991 (Count XII) -- when funds were allegedly available for only a few days for those fiscal years.

The Navy opposed the motion, and cross moved for summary judgment in its favor. No material facts are in issue. Disposition of Count IX and Count XII turns on the determination of whether the contracting officer could obligate funds for contract services to be performed throughout a fiscal year when operating under a Continuing Resolution which had a funds availability cutoff date. Therefore, disposition of Count IX and Count XII by summary judgment is appropriate. Mingus, 812 F.2d at 1391.

The purposes in enacting continuing resolutions are stated in 58 Comp. Gen. 530, 532 (1979):

In interpreting Continuing Resolutions, we must keep in mind their unique nature. Although they are passed by both Houses of the Congress and approved by the President of the United States and are thus laws of the United States, Continuing Resolutions differ significantly from normal appropriations acts. CONTINUING RESOLUTIONS ARE INTENDED BY CONGRESS TO BE TEMPORARY STOP-GAP MEASURES ENACTED TO KEEP EXISTING FEDERAL PROGRAMS FUNCTIONING AFTER THE EXPIRATION OF PREVIOUS BUDGET AUTHORITY. The Congress resorts to the Continuing Resolution only when there is no regular appropriation for a program, perhaps because the two Houses have not yet agreed on common language, because authorizing legislation has not yet been enacted, or because the President has vetoed an appropriation act passed by the Congress.

IN ENACTING CONTINUING RESOLUTIONS, THERE IS A CLEAR INDICATION THAT CONGRESS INTENDS AND EXPECTS THAT THE NORMAL AUTHORIZATION AND APPROPRIATION PROCESS WILL EVENTUALLY PRODUCE APPROPRIATION ACTS WHICH WILL REPLACE THE BUDGET

AUTHORITY CONTAINED IN THE RESOLUTION. Thus, for example, section 102 of the fiscal year 1979 Continuing Resolution provides that funds appropriated for a program by the resolution will no longer be available if the program is later funded by a regular appropriation act, or Congress indicates its intent to terminate the program by enacting an applicable appropriation act without provisions for the program.

Further, Continuing Resolutions are usually enacted in a great hurry toward the end of a session of Congress, and may not be the product of the detailed committee deliberations which produce regular appropriation acts. In sum, Continuing Resolutions are meant to provide only temporary, minimal funding and their language must be interpreted accordingly.

(Emphasis added)

Continuing Resolutions appropriate a sum of money rather than a program level. 58 Comp. Gen. at 533. They often authorize obligation of funds at a 'current rate.' The GAO has repeatedly taken the position that 'current rate' is equivalent to the total appropriation or the total funds which were available for obligation for a program during the previous fiscal year:

In those instances in which the program in question has been funded by one- year appropriations in prior years, the current rate is equal to the total funds appropriated for the program for the previous fiscal year . . . IN THOSE INSTANCES WHERE THE PROGRAM HAS BEEN FUNDED BY MULTI-YEAR OR NO-YEAR FUNDS IN PRIOR YEARS, THE CURRENT RATE IS EQUAL TO THE TOTAL FUNDS APPROPRIATED FOR THE PREVIOUS FISCAL YEAR plus the total of unobligated budget authority carried over from prior years. See our letter to Senator William Proxmire, B-152554, October 9, 1970 (116 Cong. Rec. 36298).

(Emphasis added); 58 Comp. Gen. at 533.

Section 102 of the FY 1990 Continuing Resolution provided that the appropriations made available thereunder shall be available until '(a) enactment into law of an appropriation for any project or activity for this joint resolution, or (b) enactment of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 25, 1989, whichever first occurs.' Section 108 of the first and

second Continuing Resolutions of FY 1991 contained the same standard language but with 5 October 1990 and 19 October 1990, respectively, as cutoff dates.

Cessna argues that the normal rules of being able to obligate funds for an entire year do not apply, where, as here, the Continuing Resolutions contained a specific cutoff date (MOTION PAPERS 3 at 58). Cessna's position is clearly contrary to the position taken by the Comptroller General who has stated in Comp. Gen. B-205053, December 31, 1981, that:

Continuing Resolutions generally provide that the budget authority for an activity shall remain available until (A) enactment into law of a regular appropriation for the activity, (B) enactment of the applicable appropriation without provision for the activity, or (C) a fixed cutoff date, whichever first occurs.

* * *

Continuing Resolutions appropriate a sum of money rather than a program level. 58 Comp. Gen. 530, 533 (1979); B-194362, May 1, 1979; B-152554, December 6, 1968. Further, REGARDLESS OF THEIR PERIOD OF DURATION, THEY APPROPRIATE THE FULL ANNUAL AMOUNT OF THE APPROPRIATION. See B-152554, November 4, 1974.

(Emphasis added)

In this case, the FY 1990 and 1991 Continuing Resolutions themselves clearly provided that funds appropriated would be available to the same extent as would the Appropriation Acts ultimately expected to be enacted into law. Section 101. (b) of the FY 1990 Continuing Resolution provided that 'Appropriations made by this section shall be available to the extent and in the manner which would be provided by the pertinent appropriations Act.' Section 105 of the first and second FY 1991 Continuing Resolutions contained the same standard language.

Cessna argues that when the Government operates under a Continuing Resolution with a specific funds cutoff date, it can only obligate an amount not exceeding the amount determined by the ratio of the number of days prior to the cutoff date to the number of days (365) in a fiscal year (oral arg., tr. 50). This argument is facially attractive but cannot withstand scrutiny. There is no question that the overriding purpose of a Continuing Resolution is, as the GAO observed, to keep existing Government programs functioning after the expiration of previous budget authority. Given that purpose, what Cessna wants us to hold in this case would seriously and systematically disrupt existing programs. We need

go no further than the situation before us. If, on 1 October 1990, no more than 25 days worth of FY 1990 funds could be obligated, continuation of the 0090 contract, and other contracts requiring notification of funds availability or option exercise would come to a halt. We believe that the GAO was correct in concluding that the duration of a Continuing Resolution has nothing to do with the amount that can be appropriated. That amount is limited by the total funds appropriated for the program during the previous fiscal year.

The only significance of a cutoff date -- whether one based on enactment of an appropriation or a specific date chosen by Congress, as in this case -- is that the date marks the expiration of budget authority beyond which an agency may not obligate funds. In this connection, the GAO has stated:

An agency may obligate funds only if budget authority is available under a legislatively enacted funding measure. Therefore, the authority to obligate funds exists after the expiration of a continuing resolution only if a regular appropriation bill for continuing resolution is enacted, or if the termination date of the expired continuing resolution is extended.

See Comp. Gen. B-205053, December 31, 1981.

In this case, the contracting officer issued Modification No. P00034 notifying Cessna of the availability of funds for the Second Option Year (FY 1990) on 1 October 1989, well in advance of the 25 October 1989 cutoff date of the FY 1990 Continuing Resolution. Similarly, the contracting officer issued Modification No. P00038 notifying Cessna of the availability of funds for the Third Option Year (FY 1991) on 1 October 1990, in advance of the 5 October 1990 cutoff date of the first FY 1991 Continuing Resolution and in advance of the 19 October 1990 cutoff date of the second FY 1991 Continuing Resolution.

We conclude that there is no support for the proposition that the contracting officer can obligate only a few days worth of the funds appropriated by the FY 1990 and 1991 Continuing Resolutions. We conclude also, that in obligating the full amount of the funds necessary for the entire Second and Third Option Years prior to the expiration of the budget authority cutoff dates specified in the Continuing Resolutions, there had been no violations of the Antideficiency Act (31 U.S.C. sec. 1341(a)(1)(A) & (B)). Therefore, the Navy's notices of availability of funds were not rendered ineffective so as to require cancellations of the contract services for the Second and Third Option Years.

Accordingly, Cessna's motion for summary judgment of Count IX and Count XII is denied. The Navy's cross motion for summary judgment of the same counts is granted.

Count VIII and Count XI

Additional Findings of Fact

70. Part I of the 0090 contract contains 'THE SCHEDULE' of the contract. Section H-8, Part I of the contract is entitled 'Multiyear Procurement.' It provides as follows:

H-8 MULTIYEAR PROCUREMENT

The date within which the Contracting Officer, Naval Air Systems Command, will notify the Contractor of the availability of funds sufficient for performance of the requirements for the

Second Program Year (Fiscal Year 1985) is 1 October 1984
Third Program Year (Fiscal Year 1986) is 1 October 1985
Fourth Program Year (Fiscal Year 1987) is 1 October 1986
Fifth Program Year (Fiscal Year 1988) is 1 October 1987

If the three year option is exercised, the date within which the Contracting Officer, Naval Air Systems Command, will notify the Contractor of the availability of funds sufficient for performance of the requirements for the

Second Option Year (Fiscal Year 1990) is 1 October 1989
Third Option Year (Fiscal Year 1991) is 1 October 1990

(Emphasis added) (R4, tab 2 at 7-17)

71. Part II of the 0090 contract contains the 'General Provisions- of the contract. Among the clauses included is NAVAIR 7-104.56, 'ORDER OF PRECEDENCE' (1974 OCT). This clause, fully set forth on page 8-24 of the contract provides:

In the event of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the Specifications); (b) General Provisions; (c) the other provisions of the contract whether incorporated by reference or otherwise; and (d) the Specifications and (e) the Contractor's proposal No. CMP-1351.

(R4, tab 2 at 8-24)

72. The General Provisions of the 0090 contract incorporated by reference the 'LIMITATION OF PRICE AND CONTRACTOR OBLIGATIONS' clause prescribed by DAR 7- 1903.33(c) and the 'CANCELLATION OF ITEMS' clause prescribed by DAR 7-1903.33(d).

73. DAR 7-1903.33(c), 'LIMITATION OF PRICE AND CONTRACTOR OBLIGATIONS SERVICE CONTRACTS UNDER PUBLIC LAW 90-378 or 91-142' provides, in part, as follows:

(a) This clause applies only in the event this contract is awarded on the alternative basis for award described in the Schedule as 'Multi-year Procurement.'

(b) Funds are available for performance of this contract in the amount specifically described in the Schedule, as available for contract performance. The funds so described at the time of award are not available for contract performance required by and described in the Schedule for any fiscal year (1 October - 30 September) other than the first fiscal year. UPON AVAILABILITY TO THE CONTRACTING OFFICER OF FUNDS FOR PERFORMANCE OF REQUIREMENTS IN THE NEXT SUCCEEDING FISCAL YEAR. THE CONTRACTING OFFICER SHALL NOTIFY THE CONTRACTOR IN WRITING OF THE AMOUNT OF FUNDS AVAILABLE FOR CONTRACT PERFORMANCE IN THE NEXT SUCCEEDING FISCAL YEAR AND THE CONTRACT SHALL BE MODIFIED ACCORDINGLY. This procedure shall apply for each successive fiscal year.

(c) The Government is not obligated to the Contractor for contract performance in any monetary amount in excess of that described in the Schedule or modifications thereto, as available for contract performance in the applicable fiscal year.

(d) THE CONTRACTOR IS NOT OBLIGATED TO INCUR COSTS FOR THE PERFORMANCE REQUIRED FOR ANY FISCAL YEAR AFTER THE FIRST UNLESS AND UNTIL HE HAS BEEN NOTIFIED IN WRITING BY THE CONTRACTING OFFICER OF THE AVAILABILITY OF FUNDS IN ACCORDANCE WITH PARAGRAPH (B) OF THIS CLAUSE. If so notified, the Contractor's obligation shall be increased only to the extent contract performance is required for the fiscal year for which funds have been made available.

(Emphasis added)

74. DAR 7-1903.33(d) is entitled 'CANCELLATION OF ITEMS - SERVICE CONTRACTS UNDER PUBLIC LAW 90-378 OR 91-142 (1976 JUL).' This clause provides, in part, as follows:

(a) This clause applies only in the event this contract is awarded on the alternative basis for award described in the Schedule as 'Multi-Year Procurement.'

(b) As used herein, the term 'cancellation' means that the Government is canceling, pursuant to this clause, its requirements for items as set forth in the Schedule for all fiscal years (1 October - 30 September) subsequent to that in which notice of cancellation is provided. SUCH CANCELLATION SHALL OCCUR ONLY IF THE CONTRACTING OFFICER (i) notifies the Contractor that funds will not be available for contract performance for the next succeeding fiscal year and any subsequent fiscal year; or (ii) FAILS TO NOTIFY THE CONTRACTOR PRIOR TO BEGINNING OF THE NEXT SUCCEEDING FISCAL YEAR THAT FUNDS HAVE BEEN MADE AVAILABLE FOR

PERFORMANCE IN THE SUCCEEDING FISCAL YEAR.

* * *

(d) In the event of cancellation pursuant to this clause, the Contractor will be paid, as consideration therefor, a cancellation charge not to exceed the cancellation ceiling described and separately set forth in the Schedule as being applicable at the time of cancellation.

(e) THE CANCELLATION CHARGE IS INTENDED TO COVER ONLY EXPENSES INCURRED BY THE PRIME CONTRACTOR OR HIS SUBCONTRACTOR WHICH WOULD HAVE BEEN EQUITABLY AMORTIZED IN THE UNIT PRICES FOR THE ENTIRE MULTI-YEAR CONTRACT PERIOD, BUT WHICH. BECAUSE OF THE CANCELLATION ARE NOT SO AMORTIZED. The cancellation charge shall be computed and the claim therefor made as would be applicable under the 'Termination for Convenience of the Government' clause of this contract. The claim may include reasonable startup and other nonrecurring costs such as plant or equipment relocation costs; the costs of special tooling and special equipment; allocable portions of the costs of facilities acquired or established for the conduct of the work, provided such costs have not been charged to the contract through overhead, or otherwise depreciated, and to the extent that it is impracticable for the Contractor to utilize such facilities in the conduct of his commercial work; costs incurred for the assembly, training, and transportation of a specialized work force to and from the job site; and costs not amortized by the level contract unit price solely because the cancellation had precluded anticipated benefits of Contractor or subcontractor learning. The claim shall not include any amount for:

(i) labor, material, or other expenses incurred by the Contractor or its subcontractor for performance of the canceled work;

(ii) any item of cost for which payment has already been made to the Contractor;

(iii) the remaining useful commercial life of facilities. Useful commercial life, for this purpose, means the commercial utility of the facilities rather than the physical life thereof, with due consideration given to such factors as location of facilities, specialized nature thereof, and obsolescence.

(Emphasis added)

75. The record shows that Modification No. P00006, notifying Cessna of the availability of funds ($18,933,148) for the Second Program Year (FY 1985) was issued on 3 October 1984 (MOTION PAPERS 2 at tab 11). Modification No. P00017, notifying Cessna of the availability of funds

($21,136,944) for the Third Program Year (FY 1986) was issued on 1 October 1985 (MOTION PAPERS 2 at tab 12). Modification No. P00023, notifying Cessna of the availability of funds ($21,607,433) for the Fourth Program Year (FY 1987) was issued on 1 October 1986 (MOTION PAPERS 2 at tab 13). Modification No. P00026, notifying Cessna of the availability of funds ($22,091,075) for the Fifth Program Year (FY 1988) was issued on 1 October 1987 (MOTION PAPERS 2 at tab 14).

DECISION

Count VIII and Count XI

Section H-8, Part I, of 'The Schedule' portion of the 0090 contract required, inter alia, that in the event that the 3-year option is exercised, the contracting officer notify Cessna of the availability of funds sufficient for performance of option requirements by 1 October 1989 for the Second Option Year (FY 1990) and by 1 October 1990 for the Third Option Year (FY 1991).

In compliance with Section H-8, the contracting officer issued Modification No. P00034 on 1 October 1989 notifying Cessna of the availability of funds for performance of requirements of the Second Option Year. The contracting officer issued Modification No. P00038 on 1 October 1990 notifying Cessna of the availability of funds for performance of the reqirements [sic] of the Third Option Year.

Cessna moves for summary judgment of Count VIII and Count XI contending that because the contracting officer failed to notify Cessna of the availability of funds 'prior to the beginning of' FYs 1990 and 1991, the Second and Third Option Years were 'automatic[ally]' cancelled. (MOTION PAPERS 1 at 55) For its position, Cessna relies on DAR 7-1903.33(d)(b)(ii), the 'Cancellation Of Items' clause.

The Navy opposed Cessna's motion and cross moved for summary judgment in its favor. The Navy relies on the 'Order Of Precedence' clause and contends that that clause gives precedence to the Schedule provision -- Section H-8 -- in case of inconsistency between a Schedule provision (Section H-8) and a General Provision (DAR 7-1903.33(d)).

Cessna replies that Section H-8 constitutes a deviation from the DAR and because the Navy did not obtain authority to deviate from a mandatory DAR clause, Section H-8 could not modify or override the notice requirements of DAR 7-1903.33(d)(b)(ii). (MOTION PAPERS 3 at 54)

During oral argument, the Navy for the first time raised the prospect that the clause prescribed at 7-1903.33(d) (the 'd' clause) might have been the 'wrong clause, to have included in the 0090 contract. The Navy alleged

that the clause prescribed at 7-1903.33(b), entitled 'CANCELLATION OF ITEMS - SERVICE CONTRACTS (1974 APR)' the 'b' clause) should have been specified and included in the contract. 10/ (Oral arg., tr. 183-84)

The Navy took the position that the '(d)' clause did not apply to the 0090 contract because it applied 'to a contract performed outside the United States.' Navy counsel pointed out that the 0090 contract 'was performed in Pensacola, Florida' (oral arg., tr. 184). After oral argument, Cessna submitted 'MEMORANDUM IN FURTHER SUPPORT OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT' DATED 11 January 1993 which further argued that the 'b' clause is inapplicable (MOTION PAPERS 6).

In its reply to Cessna's opposition to its cross motion for summary judgment, the Navy raised several issues of material fact: The Navy alleges that DAR 7- 1903.33(d) would 'lead to impossible results and indeed would create violations of the Anti-Deficiency Act,' because 'it is fiscally impossible for 0 & M, N funds to be made available prior to the beginning of the fiscal year in which the funds were to be obligated.' The Navy also alleges that Cessna was aware of the conflict between DAR 7-1903.33(d) and Section H-8 when it submitted its bid and that Cessna did not indicate any disagreement when the contracting officer issued the notices of funds availability for four straight years -- the Second through the Fifth Program Years (FYs 1984 - 1988). (MOTION PAPERS 4 at 54)

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Mingus, 812 F.2d 1390. In deciding a case on summary judgment, we are required to view the evidence in a light most favorable to the nonmovant and all reasonable inferences must be drawn in the nonmovant's favor. United States v.. Diebold, 369 U.S. 654, 655 (1962). In view of the genuine issues of material fact the Navy raised, Cessna's motion for summary judgment of Count VIII and Count XI is denied. The Navy's cross motion for summary judgment is also denied.

Count VII

Additional Findings of Fact

76. Section 8042 of the DoD Appropriations Act, 1989, Pub. L. No. 100-463, sec. 8042, 102 Stat. 2270, 2270-24 (1988) provided in part, as follows

Sec. 8042. NO FUNDS AVAILABLE to the Department of Defense DURING THE CURRENT FISCAL YEAR MAY BE USED to enter into any contract with a term of eighteen months or more TO EXTEND OR RENEW ANY CONTRACT FOR A TERM OF EIGHTEEN MONTHS OR MORE, FOR ANY vessel, AIRCRAFT or vehicles, THROUGH A lease, charter, or SIMILAR AGREEMENT WITHOUT

PREVIOUSLY HAVING BEEN SUBMITTED TO THE COMMITTEES on Appropriations of the House of Represent- atives and the Senate IN THE BUDGETARY PROCESS:.....

(Emphasis added)

77. At the oral argument held on 10 December 1992, the Board instructed the Navy to supplement the record to explain its understanding of the term 'budgetary process' as used in sec. 8042 and to explain what budgetary process was followed in connection with its budget request for FY 1989 (tr. 176). In compliance with that instruction, the Navy by letter dated 25 January 1993 furnished the following declaration:

DECLARATION OF LINDA A. NEWTON

I, LINDA A. NEWTON, declare that the following is true and correct to the best of my knowledge, information and belief:

1. I am Head, Support Force Branch, Operations Division, Office of Budget and Reports, Department of Navy, Comptroller, Washington, D.C. 20350-1100.

2. I have held this position since October of 1991.

3. From October of 1990 to October of 1991, I was Lead Analyst, Aircraft Procurement, Major Platforms Procurement Branch, Investment and Development Division, Office of Budget and Reports, Department of Navy, Comptroller, Washington, D.C. 20350-1100.

4. From March 1988 to October 1990, I was Aircraft Operations Analyst, Operating Forces Branch, Operations Division, Office of Budget and Reports, Department of Navy, Comptroller, Washington, D.C. 20350-1100. In this capacity I reviewed the Flying Hour Program for the Department of Navy.

5. In my present capacity as Head, Support Force Branch, I am familiar with the budgetary process for the UNFO Program and have reviewed the process for FY 1989.

6. Several years in advance of a given fiscal year, CNET [Chief of Naval Education & Training) includes the required amount of funding for the UNFO Program in its budget requests for the Flight Training activity group. This request then comes to my office where the budget request for the Navy Department is prepared.

7. This request becomes part of the request for Operations & Maintenance, Navy (O&M, N) funds, a lump sum appropriation with threshold limitations at the budget activity level. This O&M, N request goes to Congress via OSD and OMB.

8. At the same time the CNET Comptroller's Office prepares a budget

exhibit entitled, Reconciliation of Increases and Decreases, informally called an OP5. That exhibit forms the basis for the OP5 prepared in my office, which accompanies the budget request from CNET to NAVCOMPT to OSD to OMB to Congress. A copy of the relevant portion of the OP5 which went to Congress for FT 1989 is attached as Attachment 1 to this declaration.

9. An OP5 is backup budget justification material which accompanies the budget request and is used to justify to Congress any changes from the previous years in funding amounts requested or changes in the overall scope of the program and the reasons for those changes.

10. Thus, if CNET had found a way to provide the training services provided by the UNFO contract for significantly less for FY 1989, or if the number of undergraduate Naval Flight Officers (NFO) required were different, that fact would have been noted on the OP5.

11. Because Congress already knew about the contract for the UNFO Program (it had been in force for five years and had three years to go) and the funding requested did not change appreciably for FY 1989, the budgetary process required no repetition in the OP5 of what Congress already knew.

12. Another part of the process is that Members of the Congressional Committees and their staffs could make inquiries on any part, no matter how great or small, of the budget request by calling OPNAV N806, the office which receives and responds to such inquiries. To my knowledge, no request on the UNFO Program was made.

13. This is the budgetary process for funds for the UNFO Program in FY 1989 (as well as previous and later years) as I know it.

I declare under penalty of perjury that the foregoing statements are true and correct.

Dated this 22nd day of January 1993 in Arlington, Virginia.

[Signed)

LINDA A. NEWTON

78. The 'OP5' backup budget justification for FY 1989 the Navy submitted to Congress through OMB shows that it 'addressed' 'Flight Training' as a separate 'Activity Group.' It further described the flight operation to be financed to include 'contractor services for maintenance of certain training aircraft (T34C, TH57A, T2C, T47A, T44A, and TA4J'). (The Navy's 22 January 1993 submission, attach. 1). Cessna does not dispute and has offered to stipulate that 'the T-47A aircraft were the aircraft owned by Cessna that were used in performance of the services contract at issue' (see p.3, n. 2, Cessna's 19 February 1993 response to the Navy's 22 January 1993 submission).

DECISION

Count VII

Cessna moves for summary judgment of Count VII contending that the Navy's 'failure to inform Congress' of its exercise of the 3-year option in accordance with the requirement of sec. 8042 of the FY 1989 DoD Appropriation Act rendered funds appropriated for that fiscal year unavailable for obligation. (MOTION PAPERS 1 at 49-50) In support of its position, Cessna argues that the 3-year option was 'to extend [the 0090] contract for a term of eighteen months or more,' and constituted a 'similar agreement' within the meaning of sec. 8042. (MOTION PAPERS 1 at 42)

The Navy opposed Cessna's motion and cross moved for summary judgment in its favor. The Navy contends that sec. 8042 required only that it 'conform to the ' budgetary process" and 'Nowhere does the statute mention, or even imply, any required notice of an intention to extend a contract.' (MOTION PAPERS 2 at 66- 67) The Navy contends that the statute -- 10 U.S.C. sec. 2401 -- Cessna relied upon for its conclusion that the 0090 contract was subject to sec. 8042 did not apply to any contract entered into by DoD before 1 December 1983. The Navy points out that the 0090 contract was entered into in May 1983. (MOTION PAPERS 2 at 67)

In its reply to the Navy's cross motion, Cessna argues that even if sec. 8042 did not require 'an express advance notice,' for the Navy to survive its motion for summary judgment, the Navy has to show that it 'submitted' something to Congress during the 'budgetary process.' (MOTION PAPERS 3 at 47)

The Navy in reply contends that 'There is no dispute that the funds for this project went through the budgetary process and were included in the FY89 DOD Appropriation Act. The project would not have been funded and the contractor would not have been paid, had this not occurred.' In addition, the Navy also raised the threshold question of whether the 0090 contract was subject to sec. 8042 at all. In this connection, the Navy argues that the 0090 contract was not a lease nor a lease for 'major items.' (MOTION PAPERS 4 at 50-51)

No material facts are in issue. Disposition of Count VII turns on (1) whether extension of the 0090 contract was subject to sec. 8042 of the FY 1989 DoD Appropriation Act; and if so, (2) whether the funds made available by that Act could be used for extension of the 0090 contract by option. Therefore, disposition of Count VII by summary judgment is appropriate. Mingus, 812 F.2d at 1391.

We consider first the threshold question of whether extension of the

0090 contract by a 3-year option was subject to sec. 8042. Cessna contends that the contract constituted a 'similar agreement' within the meaning of sec. 8042.

The language used in sec. 8042 had been modified over the years. Its earliest version appeared in the Supplemental Appropriations Act, 1983, Pub. L. 98-63, 97 Stat. 301, enacted into law on 29 July 1983. As it originally appeared in the 1983 Act, sec. 723 contained, inter alia, the following provision:

No funds available to the Department of Defense during the current fiscal year may be used to enter into any contract with a term of three years or more, inclusive of any option for contract extension or renewal, for any vessels, aircraft or vehicles, through a LEASE, CHARTER, OR SIMILAR AGREEMENT, that imposes an estimated termination liability (excluding the estimated value of the leased item at the time of termination) on the Government exceeding 50 percent of the original purchase value of the vessel, aircraft, or vehicle involved for which the Congress has not specifically provided authority in an appropriation Act for the obligation of 10 percent of such termination liability.

(Emphasis added) Pub. L. 98-63, 97 Stat. 301, 309.

As reflected in the legislative history of the 1983 Supplemental Appropriations Act, sec. 723 was enacted to curb DoD's flexibility in entering into expensive, long-term contracts in advance of specific appropriation

authority:

BUDGETING FOR CONTRACT TERMINATION LIABILITY FOR LEASING PROGRAMS

The Committee recommends a new provision to apply to certain lease and charter contracts of the Department of Defense. This amendment is directed to an increasing trend in recent years toward leasing assets which had previously required procurement appropriations. Lease contracts require a fraction, and in some cases none, of the up-front budget authority attendant to procurement. The most recent example of this is the TAKX program wherein the Navy contracted for 13 roll-on/roll-off vessels for a period of up to 25 years. Obligational authority available under the Navy industrial fund was used to initiate the lease, and annual operation and maintenance funds are expected to cover year- to-year costs. No specific appropriation authority was needed to incur this substantial obligation. If the ships had been purchased, procurement appropriations exceeding $2,000,000,000 would have been needed.

It is the Committee's view that THE CONGRESS CANNOT AFFORD THE COST OF THE DEPARTMENT'S FLEXIBILITY TO ENTER INTO EXPENSIVE, LONG-TERM CONTRACTS IN ADVANCE OF SPECIFIC APPROPRIATION AUTHORITY. The recommended provision, by requiring advance appropriations of at least 10 percent of the estimated termination liability of such contracts, will insure congressional control over leases and charters for vessels, aircraft and vehicles.

The Committee has attempted to cover all lease and charter contracts for which the Government would incur substantial termination liability. If there is any uncertainty as to the application of the provision to a specific proposal, the Department should consult the Committee prior to entering into a contract. IT IS THE COMMITTEE'S INTENTION TO CONTINUE THE PROVISION IN ANNUAL APPROPRIATION MEASURES AND IT WILL CONSIDER FURTHER RESTRICTIONS AND MODIFICATIONS IF NECESSARY.

In requiring specific advance authority in an appropriation act, the Committee expects any request for such programs to be accompanied by a detailed justification and a comprehensive cost analysis, including any tax expenditures, and a comparison of leasing versus purchase alternatives. These analyses must be certified by the Department of the Treasury and the Office of Management and Budget.

S. Rep. No. 98-148, 98th Cong. 1st Sess. 36-37 (1983) (emphasis added) (MOTION
PAPERS 3 at tab 65).

The above provision of the 1983 Supplemental Appropriations Act was nearly identical to sec. 1202(d) of the Department of Defense Authorization Act, 1984, Pub. L. 98-94, 97 Stat. 614, 682, enacted into law a few months later, on 24 September 1983. Section 1202(d) of the 1984 DoD Authorization Act provided:

(d) Funds available to the Department of Defense may not be used to enter into any contract during fiscal year 1984 under section 2401 of title 10, United States Code, as added by subsection (a), the term of which is for 3 years or more, inclusive of any option for contract extension or renewal, for any vessels, aircraft, or vehicles, THROUGH A LEASE. CHARTER. OR SIMILAR AGREEMENT, that imposes an estimated termination liability (excluding the estimated value of the leased item at the time of termination) on the United States exceeding 50 percent of the original purchase value of the vessel, aircraft, or vehicle involved for which the Congress has not specifically provided budget authority for the obligation of 10 percent of such termination liability.

(Emphasis added)

As indicated by sec. 1202(d), subsection (a) of sec. 1202 was added to 10 U.S.C. sec. 2401. As codified, 10 U.S.C. sec. 2401 provides, in part, as follows:

(a)(1) The Secretary of a military department may make a contract for the lease of a vessel or aircraft OR FOR THE PROVISION OF A SERVICE THROUGH USE BY A CONTRACTOR OF A vessel or aircraft only as provided in subsection (b) if -

(A) the contract will be a long-term lease or charter; or

(B) the terms of the contract provide for a substantial termination liability on the part of the United States.

(2) The Secretary of a military department may make a contract that is an agreement to lease or charter or an agreement to provide services and that is (or will be) accompanied by a contract for the actual lease, charter, or provision of services only as provided in subsection (b) if the contract for the actual lease, charter, or provision of services is (or will be) a contract described in paragraph (1).

* * *

(d)(1)(A) In this section, the term 'long-term lease or charter (except as provided in subparagraph (B)) means a lease, charter, SERVICE CONTRACT, or conditional sale agreement -

(i) the term of which is for a period of five years or longer or more than one-half the useful life of the vessel or aircraft; or

(ii) the initial term of which is for a period of less than five years but which contains an option to renew or extend the agreement for a period which, when added to the initial term (or any previous renewal or extension), is five years or longer.

As support for its argument that the 0090 contract constitutes a 'similar agreement,' Cessna relies on several provisions of 10 U.S.C. sec. 2401. Cessna contends that 'Section 2401(a)(1) authorizes contracts 'for the lease of a vessel or aircraft OR FOR THE PROVISION OF A SERVICE THROUGH USE BY A CONTRACTOR OF A[N] . . . AIRCRAFT,' provided the contract is a 'long-term lease or charter" (emphasis added). Cessna points out further that 10 U.S.C. sec. 2401(d)(1) defines 'a long-term lease or charter' as 'a lease, charter, SERVICE CONTRACT, or conditional sale agreement' (emphasis added) (MOTION PAPERS 1 at 44).

The trouble we have with Cessna's reliance on any provisions of 10 U.S.C. sec. 2401 is that sec. 10 U.S.C. sec. 2401 note (sec. 1202(d) of the Authorization Act) specifically provides that:

Section 2401 of title 10, United States Code, as added by paragraph (1),

shall not apply in the case of any lease or charter agreement entered into by the Department of Defense before December 1, 1983.

Even assuming that the 0090 contract was a 'lease, charter or similar agreement,' the contract, having been entered into in May 1983, is one to which
the provisions of 10 U.S.C. sec. 2401 are not applicable.

Cessna, however, does not rely on 10 U.S.C sec. 2401 alone. It points out that as part of Continuing Appropriations, 1985 - Comprehensive Crime Control Act Of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1938 (1984), Congress tightened sec. 1202(d) by making Congressional approval a requirement for all contracts whose terms was eighteen months or more. Section 8070 of Continuing Appropriations, 1985, reflected this change:

Section 8070. No funds available to the Department of Defense during the current fiscal year may be used to enter into any contract WITH A TERM OF EIGHTEEN MONTHS OR MORE, inclusive of any option for contract extension or renewal, for any vessel, aircraft or vehicles, through a lease, charter, or similar agreement without prior congressional approval of appropriation. Further, any contractual agreement which Imposes an estimated termination liability (excluding the estimated value of the leased item at the time of termination) on the Government exceeding 50 per centum of the original purchase value of the vessel, aircraft, or vehicle must have specific authority in an appropriation Act for the obligation of 10 per centum of such termination liability [emphasis added].

As reflected in the legislative history of the 1985 Continuing Appropriations law, Congress redefined long-term lease as 18 months or more because the Air Force and the Navy had managed to avoid compliance with the leasing statute:

Leasing. - The Committee recommends a modification to existing law to require congressional approval of appropriations prior to the Defense Department entering into any long-term leasing arrangements. A long-term lease is redefined in the provision as 18 months or more inclusive of options for renewal or extension.

Two years ago the Congress adopted bill language recommended by the Committee to establish a formula for prior approval of long-term leases of ships, aircraft, vehicles, and major weapon systems. Since its adoption, several lease contracts have been initiated which would be covered under the spirit of the provision, but technically developed to be exempt. The Air Force has proceeded with the leased replacement of 120 executive type CT-39 aircraft by designing the contract methodology to be exempt from the percentage coverage of termination liability provisions of

existing law. Similarly, the Navy just recently entered into A 3-YEAR LEASE AGREEMENT with a foreign government for aggressor TRAINING AIR- CRAFT, BY ENTERING INTO THE AGREEMENT FOR MAINTENANCE SERVICES WITH THE PROVISION OF THE AIRCRAFT AS INCIDENTAL. THE NAVY MANAGED TO AVOID COMPLIANCE WITH THE LEASING STATUTE.

Under the circumstances, the Committee is forced to strengthen the leasing provision by extending coverage of lease terms to a period of 18 months, requiring specific approval of appropriations for such long-term leases, and requiring the budgeting of at least 10 percent of termination liability if such liability is in excess of 50 percent of the replacement value of the leased asset. Previously, the termination liability coverage was required only for leases with a term in excess of 3 years. Under the recommended provision, the requirement is extended to all leases regardless of term.

(Emphasis added); S. Rep. No. 98-636, 98th Cong. 2d Sess. 217 (1984) (MOTION
PAPERS 3 at tab 66).

Section 8070 of the 1985 Continuing Appropriations Act was further modified in the Supplemental Appropriations, Fiscal Year 1985, Pub. L. 99-88, 99 Stat. 293, 312 to cover 'renewal and extension' of any contract beyond a term of eighteen months or more. Also added was the language relating to submission to the Senate and House Committees in the 'bugetary process' [sic]:

Sec. 8070. None of the funds available to the Department of Defense during the current fiscal year may be used to enter into any contract with a term of eighteen months or more OR TO EXTEND OR RENEW ANY CONTRACT FOR A TERM OF EIGHTEEN MONTHS OR MORE, for any vessel, aircraft or vehicles, through a lease, charter, or similar agreement WITHOUT PREVIOUSLY HAVING BEEN SUBMITTED TO COMMITTEES ON APPROPRIATIONS OF THE HOUSE OF REPRESENTATIVES AND THE SENATE IN THE BUDGETARY PROCESS, Further, any contractual agreement which imposes an estimated termination liability (excluding the estimated value of the leased item at the time of termination) on the Government exceeding 50 per centum of the original purchase value of the vessel, aircraft, or vehicle must have specific authority in an appropriation Act for the obligation of 10 per centum of such termination liability.

(Emphasis added) This version of the so-called 'lease provision' was carri ed
forward into the 1989 DoD Appropriation Act as sec. 8042.

In expanding the lease provision to cover renewals and extensions, the Senate Appropriations Committee expressly stated that the provision applied to service contracts where vessels, aircraft, or vehicles are provided as an incident to provision of services:

Leasing. - The Committee recommends a modified provision which amends 8070 of Public Law 98-473, the Department of Defense Appropriation Act 1985 concerning the lease of vessels, aircraft and vehicles for periods in excess of 18 months.

Since enactment of section 8070, various interpretations of legislative intent have emerged as to the justification required to enter into a lease for extended periods. Section 8070 was motivated by Congress' continued need to review and approve Defense Department plans to enter into long-term leases for major items, as with any other acquisition proposal. Prior to enactment of this provision, the Defense Department was empowered to enter into lease agreements for extended periods far in advance of appropriations approval. In practice, Congress has been forced either to finance these lease agreements after the fact, or incur termination costs to abrogate contracts. THE COMMITTEE SEEKS A CLEAR DISPLAY OF PROPOSED LEASES in excess of 18 months as part of the Department's justification material which supports each budget request, permitting adequate review in advance of any lease obligation.

The modified provision recommended in the supplemental appropriations bill would still permit lease contracts up to 18 months. SUBSEQUENT RENEWAL OR EXTENSION for any negotiated lease CONTRACT OPTION MUST HE ADDRESSED IN THE BUDGET JUSTIFICATION MATERIAL submitted to the Committee to support appropriation requests. Leases in excess of 18 months are clearly permissible provided the justification is submitted and adequate appropriations approved.

This provision applies to any SERVICE CONTRACT which incorporates what is essentially A LEASE OF vessels, aircraft, and vehicles and should be handled in a similar manner as described previously. Last year, the Navy entered into a LONG-TERM SERVICE LEASE OF KFIR AIRCRAFT. In the Navy's view, THE AIRCRAFT WERE CONSIDERED TO BE ANCILLARY TO THE PROVISION OF LEASED SERVICES. The Committee does not share this interpretation and intends such service leases to be covered by the revised provision.

(Emphasis added); S. Rep. No. 99-82, 99th Cong. 1st Sess. 66-67 (MOTI ON PAPERS
3 at tab 67).

As reflected above, sec. 8042 of the FY 1989 DoD Appropriation Act had a long and at times tortuous history. Different versions of the

so-called 'lease provision' had been included in annual appropriation measures to insure congressional control over DoD's practice of entering into expensive long-term leases for aircraft, vessels and vehicles in advance of specific appropriation authority. The lease provision had been tightened and modified over the years when Congress perceived that the military departments had been devising contract arrangements to avoid the prohibitions of the provision.

The parties agree at least that a 'service' contract was involved. Cessna characterized the 0090 contract as a service contract involving the provisioning of aircraft (oral arg., tr. 13-14); the Navy characterized it as a 'training service contract' (oral arg., tr. 170). We have noted elsewhere in this opinion that the 0090 contract was authorized pursuant to 10 U.S.C. sec. 2306(g) which gave DoD multiyear contracting authority for 'specialized training necessitating high quality instructor skills (for example, pilot and other aircrew members . . .)' (finding 59). Cessna counsel represented to the Board that no lease was executed between Cessna and the Navy (Oral arg., tr. 175).

We are persuaded by the historical development of the lease provision to conclude that the Congress intended sec. 8042 to apply to a long-term service contract involving the provisioning of aircraft.

The plain language of sec. 8042 applied to an extension or renewal of a contract for a term of 18 months or more. By structuring the option as one for 3-years, the Navy had brought the option within the long-term definition of sec. 8042. As described in the scope of the contract, the purpose of the contract was for training aircrew flight officers. The training system procured 'consists of airborne training services utilizing commercial aircraft' with the provision of various specified equipment. Based on the evidence in the record, we conclude that the 0090 contract was one for services requiring the provisioning of aircraft. We conclude, therefore, that exercising the 3-year option was subject to sec. 8042 of the FY 1989 DoD Appropriations Act.

We consider next whether the funds made available by the FY 1989 DoD Appropriation Act could be used to extend or renew the 0090 contract. Resolution of this issue depends upon whether extending the contract was 'addressed' in the budget requests submitted to Congress in the 'budgetary process.' Relying on Senate Report No. 99-82, 99th Cong., 1st Sess. 66 (MOTION PAPERS 3 at tab 67), Cessna argues that 'what Congress wanted 'submitted' for a 'renewal or extension' of 'any service contract' was a 'clear display' of the proposed action in the 'Department's justification material' so as to permit ' adequate review" (MOTION PAPERS 3 at 49-50).

While the Senate Committee on Appropriations Report indeed states that it seeks 'a clear display of proposed leases . . . as part of the Department's

justification material which supports each budget request,' subsequent renewal or extension of contract options need only 'be addressed in the budget justification material submitted to the Committee to support appropriation requests.' See Senate Report No. 99-82, 99th Cong., 1st Sess. 66 (MOTION PAPERS 3 at tab 67).

In this case, the Navy submitted its FY 1989 budget request through OMB to Congress. The budget request was accompanied by an 'OP5' backup budget justification. The 'OP5' in the record before us shows that it 'addressed' 'Flight Training' as a separate 'Activity Group.' It further described the flight operation to be financed to include 'contractor services for maintenance of certain training aircraft (T34C, TH57A, T2C, T47A, T44A, and TA4J).'

Cessna does not dispute and has offered to stipulate that 'the T-47A aircraft were the aircraft owned by Cessna that were used in performance of the services contract at issue' (finding 78).

Whether Congress already knew about the UNFO Program is irrelevant. We note that when the 0090 contract was entered into in May 1983, there was no law, similar to sec. 8042, which restricted the use of funds made available unless a 'clear display' of a proposed services contract involving the provisioning of aircraft had first been submitted to the Congressional committees in the budgetary process. There is no evidence in the record that Congress had taken the Navy to task for not complying with sec. 8042 in renewing the 0090 contract. If past history is any guide, Congress has not been timid in letting DoD know that it overstepped its bounds. We conclude that the Navy had 'addressed' renewal of the 0090 contract in the budget request for FY 1989 submitted to Congress in the 'budgetary process.' We conclude therefore, the funds appropriated for FY 1989 were available for obligation by the contracting officer when exercising the 3-year option.

Accordingly, Cessna's motion for summary judgment of Count VII is denied. The Navy's cross motion for summary judgment of Count VII is granted.

CONCLUSION

As to Count I and Count XIII, Cessna's motion for summary judgment is denied on the merits. The Navy's cross motion for summary judgment is granted on the merits.

As to Count II, Cessna's motion for summary judgment is denied on the merits. The Navy's cross motion for summary judgment is granted on the merits.

As to Count III, Cessna's motion for summary judgment is denied on the merits. The Navy's cross motion for summary judgment is granted on the

merits.

As to Count IV and Count X, Cessna's motion for summary judgment is denied on the merits. The Navy's cross motion for summary judgment is granted on the merits.

As to Count IX and Count XII, Cessna's motion for summary judgment is denied on the merits. The Navy's cross motion for summary judgment is granted on the merits.

As to Count VIII and Count XI, Cessna's motion for summary judgment is denied. The Navy's cross motion for summary judgment is denied.

As to Count VII, Cessna's motion for summary judgment is denied on the merits. The Navy's cross motion for summary judgment is granted on the merits.

12 March 1993
PETER D. TING
Administrative Judge
Armed Services Board of Contract Appeals

I concur
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed Services
Board of Contract Appeals

I concur
ALAN M. SPECTOR
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

Notes

1. In ruling on the Navy's Motion to Dismiss, we have struck from the co mplaint all allegations of violations of title 18, United States Code, criminal statutes and 31 U.S.C. secs. 1350 and 1519 for lack of juris- diction. Cess na, Aircraft Co., ASBCA No. 43196, 92-_ BCA par. __.

2. We find this term useful in referring to the various funding-related statutes involved in this appeal. The term was apparently coined by the Government in referring to the Antideficiency Act in another case. See H olly Corporation. ASBCA No. 24975, 83-1 BCA par. 16,327 at 81,165.

3. Even though the DoD Accounting Manual referred to 31 U.S.C. sec. 1517, we believe the correct reference should be 31 U.S.C. sec. 1514(a) which authorizes the prescription of administrative regulations for apportionments by the head of each executive agency.

4. Executive Order No. 11,541, 35 Fed. Reg. 10,737 (1970), as amended by Exec. Order No. 12,013, 42 Fed. Reg. 54,931 (1977); Exec. Order No. 12,027, 42 Fed. Reg. 61,851 (1977); Exec. Order No. 12,318, 46 Fed. Reg. 42,833 (1981).

5. As quoted from the text of the GAO decision at 42 Comp. Gen. 274-75, these statutes provided, respectively, as follows:

'No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment.....

* * *

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

* * *

Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.'

6 . As originally enacted, sec. 2306(g) applied only to services 'to be performed outside the forty-eight contiguous States and the District of

Columbia.' A 1981 amendment deleted the above limitation. See Pub. L. 97-86,
sec. 909(b)(1), 95 Stat. 1099, 1118.

7. Cessna acknowledged that 'if she [contracting officer] thought that the caveat was not applicable anymore, she could have drawn a line through i t . . .
and written a note on it 'no longer in effect" (oral arg., tr. 39).

8. 10 U.S.C. sec. 2306(h)(5) provides:
(5) In the event funds are not made available for the continuation of a contract made under this subsection into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from-
(A) appropriations originally available for the performance of the contract concerned;
(B) appropriations currently available for procurement of the type of property concerned, and not otherwise obligated; or
(C) funds appropriated for those payments.
(Emphasis added)

9. Earlier version of DAR 7-1903.33(c) and (d) had been the subject of litigation in the Court of Claims. Although only DAR 7-1903.33(d) is dir ectly
in dispute here, we set out DAR 7-1903.33(c) because the Court of Claim s, in a
case somewhat similar factually to this one, had construed the two DAR provisions together. See international T & T.. ITT Defense Com. Div. v. United
States, 453 F.2d 1283 (Ct. Cl. 1972).

10. The 'b' clause provides that 'cancellation shall occur only if, by the dat e
or within the time period specified in the Schedule, or such further time a s
may be agreed to, the Contracting Officer . . . (ii) fails to notify the Contractor that funds have been made available for performance of the Pr ogram
Year requirement for the succeeding Program Year.' This clause does not require
notification prior to the beginning of the next succeeding fiscal year, as in the 'd- clause.

11. The FY 1989 provision had been carried forward in appropriation act s in
every year beginning with the Supplementary Appropriation Act of FY 1 983. See
Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, 97 Stat. 301, 309
(1983); Department of Defense Appropriations Act, 1984, Pub. L. No. 98 -212,
Sec. 778, 97 Stat. 1421, 1452 (1983); Act of Oct. 12, 1984, Pub. L. No. 9 8-473,
Sec. 8070, 98 Stat. 1837, 1938; Supplemental Appropriations for FY 198 5, Pub.
L. No. 99-88, sec. 8070, 99 Stat. 293, 312 (1985); Act of Dec. 19, 1985, Pub.
L. No. 99-190, Sec. 8054, 99 Stat. 1185, 1212; Act of Oct. 18, 1986, Pub. L.
No. 99-500, Sec. 9050, 100 Stat. 1783, 1783-111; Act of Dec. 22, 1987, Pub. L.
No. 100-202, Sec. 8052, 101 Stat. 1329, 1329-72.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 43196, Appeal of Cessna Aircraft Company, rendered in conformance with the Board's Charter.

EDWARD S. ADAMKEWICZ

Recorder, Armed Services

Board of Contract Appeals
1993 WL 89795 (A.S.B.C.A.), 93-3 BCA 25,912, ASBCA No. 43,196
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ARMED FORCES BOARD OF CONTRACT APPEALS

Appeal of --	)
	)
Cessna Aircraft Company	)ASBCA No. 43196
Under Contract No. N00019-83-C-0090	)

APPEARANCE(S) FOR THE APPELLANT:

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OPINION BY ADMINISTRATIVE JUDGE TING

Cessna Aircraft Company ("Cessna") submitted a $25 million claim to the Department of the Navy. The contracting officer did not issue a decision within 60 days as required by Section 6(c)(1) of the Contract Disputes Act, 41 U.S.C. s 605(c)(1). Cessna appealed on the basis that its claim was deemed denied pursuant to 41 U.S.C. s 605(c)(5). The contracting officer subsequently belatedly issued a decision dated 15 November 1991 denying Cessna's claim (R4, tab 19).

Thereafter, Cessna filed a 15-count complaint, and moved for partial summary judgment on 11 of the 15 counts. The Navy cross-moved for summary judgment on those same

counts. In a decision issued on 12 March 1993, we denied both parties' motions on Count VIII ("Funding Notice for Second Option Year Was Late") and Count XI ("Funding Notice for Third Option Year Was Late"), denied Cessna's motion and granted the Navy's cross-motion for summary judgment on the remaining 9 counts. See Cessna Aircraft Company, ASBCA No. 43196, 93-3 BCA p 25,912.

In this decision, we deal with Counts V ("Option Not Timely Exercised") and Count VI ("Option Required Voluntary Services"), as to which neither party moved for summary judgment, and with Count VIII and Count XI as to which the parties' summary judgment motions were denied.

Because we deny this appeal, we need not deal with Count XIV ("Implied-In-Fact Contract") and Count XV ("Constructive Change") which address the damages aspects of Cessna's claim.

FINDINGS OF FACT

1. In May 1983, the Naval Air Systems Command ("NAVAIR" or "the Navy") entered into Contract No. N00019-83-C-0090 ("the UNFO Contract") with Cessna. Among other requirements, the contract required Cessna to furnish radar-equipped aircraft and to "provide services to assist in Radar and Navigation training of Undergraduate Naval Flight Officers [UNFOs]" at the United States Naval Air Station, Pensacola, Florida. Cessna was required to provide "all logistics/maintenance support." (R4, tab 1 at 2-1)

2. Prior to the UNFO contract, the Navy had been training its pilots in T-39 aircraft. By the early 1980's, "[t]he T-39's were pretty worn out . . . one of the radar systems on the airplane had become unsupportable." (Tr. 1/66)

3. The UNFO Contract was a multi-year (5 year) contract with one 3-year option. Multi-year contracts for services were authorized by 10 U.S.C. s 2306(g). [FN1] Defense

Acquisition Regulation (DAR) 1-322.1(a) explained the multi-year contracting procedure as follows:

Multi-year contracting is a method of acquiring for DoD planned requirements for up to a 5-year period . . . without having total funds available at time of award. Multi-year contract quantities are budgeted for and financed in accordance with the applicable program year as reflected in the DoD Five-Year Defense Program. . . . The contractor is protected against loss resulting from cancellation by contract provisions allowing reimbursement of unrecovered nonrecurring costs included in prices for canceled items. However, the cancellation ceiling for any contract may not be in excess of $5 million unless the Congress, in advance, approves such a cancellation ceiling.

The Deputy Assistant Secretary of the Navy (Shipbuilding and Logistics) determined that the UNFO Program met the requirements for a multi-year service contract as described in DAR 1-322.1d(3), and by memorandum dated 30 September 1982 to NAVAIR, granted authority to enter into a multi-year service contract for the UNFO program. [FN2]

4. Even though 10 U.S.C. s2306(g)(2)(B) permitted an option to renew a multi- year contract "for a reasonable period not to exceed three years" (see note 1), DAR Part 15 (Options) required at 1-1502(e) that "[t]he total of the basic and option periods shall not exceed five years in the case of services." (App. R4, tab 105)

5. By memorandum dated 3 September 1982 to the Chief of Naval Material, the Commander of NAVAIR requested a one-time deviation from the requirement of DAR 1-1502(e) to "increase the total period contracted for to five firm years plus either three one year options or one three year option for a total of eight years." Justification for the requested deviations was given as follows:

3. The anticipated need for the UNFO program exceeds beyond the first contract period. Continuity of operation and

the potential cost of disrupted service justifies the inclusion of an option. Additionally, inclusion of the option is considered essential to the UNFO program in order that high start up and phase in costs can be spread over the longest time period allowable by statute.
(App. R4, tab 105) By memorandum dated 7 October 1982, the Chief of Naval Material granted the requested deviation allowing "a total basic contract and option period of up to eight (8) years for the subject services" (app. R4, tab 113).

Contract Funding

6. Most of NAVAIR's contracts were for aircraft and related systems. These contracts were funded with "Aircraft Procurement Navy" or "APN" funds (tr. 3/87). Because the UNFO contract was authorized as a service contract under 10 U.S.C. s 2306(g), it had to be funded with "Operations & Maintenance Navy" (O&MN) funds (tr. 1/122, 4/62, 68).
7. The Government begins a new fiscal year on 1 October. O&MN funds for contract work beginning in a new fiscal year are not available for obligation until the start of the new fiscal year (tr. 3/99, 162). Thus, even though the Congress passes an appropriation bill and the President signs that bill prior to 1 October of a new fiscal year, where O&MN funds are involved, no unconditional obligation of such funds can be made before 1 October (tr. 3/162). In addition, O&MN funds expire at the end of a fiscal year, i.e., 30 September of that fiscal year. See 31 U.S.C. s 1301.
8. According to the Procuring Contracting Officer (PCO), that was the reason the option provision of the contract "Schedule" (Special Provision H-6) specified that the 3-year option must be exercised "not later than 1 October 1988" (tr. 3/99).
9. Section H sets out the "Special Provisions" applicable to the UNFO contract. Special Provision H-5 stated:

OPTION TO EXTEND SERVICES (29 APR 1977) (DAR 7-1903.22)

The Government may require the Contractor to continue to perform any or all items of services under this contract within the limits stated in the Schedule. The Contracting Officer may exercise this option, at any time within the period specified in the Schedule, by giving written notice to the Contractor. The rates set forth in the Schedule shall apply to any extension made pursuant to this option provision unless provision for appropriate price adjustment has been made elsewhere in this contract.

(Emphasis added) (R4, tab 1 at 7-13)

10. Special Provision H-6 provided in pertinent part:

EXERCISE OF OPTION

Pursuant to the "Option to Extend Services" clause, the option for the three option years will be exercised, if at all, in writing by a unilateral modification to this contract issued by the Contracting Officer, Naval Air Systems Command, not later than 1 October 1988.

* * *

(Emphasis added) (R4, tab 1 at 7-13)

11. Section I set out the "GENERAL PROVISIONS" of the contract. Among the standard DAR clauses "checked" as applicable was the "Availability Of Funds" clause (1962 SEP), DAR 7-104.91(a). This clause stated:

> Funds are not presently available for this procurement. The Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment for the contract purposes can be made. No legal liability on the part of the Government for payment of any money shall arise unless

and until funds are made available to the Contracting Officer for this procurement and notice of such availability to be confirmed in writing by the Contracting Officer, is given to the Contractor.

12. The "Availability Of Funds" clause was initially included in the UNFO contract in May 1983 because no funds were available at that time. Contract work was not scheduled to commence until FY 84, and O&MN funds for FY 84 would not have become available for obligation until 1 October 1983. (Tr. 3/175) The Navy subsequently funded the UNFO work for the First Program Year (FY 84) by Modification No. P00001 dated 24 February 1984 (R4, tab 2). The "Availability of Funds" clause was deleted as part of Modification No. P00001 (R4, tab 2 at 5, p 7).

Implementation Of The UNFO Program

13. UNFO training was to take place at the Naval Air Station in Pensacola, Florida (tr. 1/8). To perform the training services under the contract, Cessna modified 15 of its Citation S-II aircraft. These modified aircraft contained "radar[s] that [were] designed specifically for the training program and some other electronics equipment that the Navy required." The Navy designated these aircraft as T-47As. (Tr. 1/118)

14. Cessna modified the Citation S-IIs at its plant in Wichita, Kansas. After the aircraft were accepted by the Navy, they were transported to Pensacola. (Tr. 1/63-64)

15. The Navy did not own the aircraft. Cessna built the aircraft and sold them. Cessna then leased the aircraft back for use in the training program. (Tr. 1/119)

16. In addition to the aircraft, Cessna also furnished the simulators required for training (tr. 1/159).

17. At the oral argument held on 10 December 1992, Cessna's counsel represented to the Board that Cessna amortized the non-recurring expenses of the UNFO contract over 8 years:

JUDGE TING: Did the contractor in fact amortize the contract over eight years, or five?

MR. FENSTER: Eight. It was told to do that by the Navy. And [it] did it.

(Oral argument at tr. 18) At the hearing, Cessna's witness testified "Cessna in their pricing had amortized or spread many of the non-recurring costs over the 8-year contract period, so that if the contract had not been extended, Cessna would have only recovered 5/8ths, effectively, of those costs' (tr. 2/74). We find that having performed all 8 years of the UNFO contract, Cessna has not shown that it still had unamortized expenses remaining to be paid.

18. Once the aircraft and simulators were built, Cessna implemented the second phase of the UNFO program by moving people and equipment to Pensacola "to run the operational side of the contract" (tr. 1/120).

19. Cessna had a site manager and two assistants in Pensacola. In addition, it had "about 100 subcontractor personnel" there (tr. 1/64). Cessna's UNFO Program Manager remained in Wichita, Kansas (tr. 1/65). Cessna administered the contract out of its Wichita offices (tr. 1/64).

20. Cessna had a number of subcontractors. Each of them maintained an office in Pensacola. (Tr. 1/129) In addition to

smaller subcontractors, Northrop Worldwide Aircraft Services, Inc., provided aircraft maintenance and pilot services. Northrop Defense Systems Division provided radar maintenance services, and Singer Link provided the training simulators and simulator maintenance services. (Tr. 1/129)

21. Cessna's contracts with its major subcontractors were also structured on the basis of a base contract for 5 years plus a 3-year option (tr. 1/148).

I. The Option

Intent To Exercise Option

22. In early 1988, prior to the expiration of the Fifth Program Year (30 September 1988) of the UNFO contract, Cessna's Business Manager/Contract Administrator discussed with the PCO the possibility of exercising the option early so that Cessna "wouldn't have to worry about [the] potential of the contract shutting off and whether or not to lay in any more spares." He understood the PCO to have said that "she didn't think it was very likely that she would have funds very early before the end of the contract to do that, that it would probably be closer to the time that was referred in the contract." (Tr. 1/165)

23. In late March or early April, 1988, Cessna's Vice President of Finance called the PCO and inquired whether the Navy had any intent of exercising the option (tr. 2/71). This inquiry was prompted by several reasons: (1) if the Navy was not going to exercise the option, Cessna would begin to cut back on stocking spare parts for aircraft maintenance, (2) Cessna had to make plans to extend its subcontracts, and (3) Cessna was interested "from a financial perspective" because it had "assumed 8 years of revenue" (tr. 2/74, 3/76).

24. At Cessna's request, the PCO sent Cessna a "NOTICE OF INTENT TO EXERCISE OPTION UNDER CONTRACT N00019-83-C-0090" dated 18 April 1988. The letter stated in part:

1. You are hereby notified of our intent to exercise the option for the three option years under Contract N00019-83-C-0090. Pursuant to Special Provision H- 6, "Exercise of Option", we will exercise the option for the three option years, if at all, not later than 1 October 1988.

(App. R4, tab 143) Notwithstanding mention of the "not later than 1 October 1988" exercise date in the letter, Cessna did not take the position, at that time, that the option had to be exercised before the base contract expired, i.e., 30 September 1988 (tr. 2/120).

25. Cessna was not seriously concerned whether the Navy would exercise the option. Cessna's Deputy Program Manager and later Program Manager explained:

We were the only one in position to continue those operations at Pensacola from a contractor's standpoint. The Navy themselves were not in a position for continuing the service on their own, they didn't have the aircraft or the equipment, the radars and that kind of thing. They had retired their own aircraft when we came.

(Tr. 1/131) The Navy's Contracts Division Director testified that "[t]here was no other choice but to exercise the option" (tr. 3/36).

Meetings And Discussions Prior To 1 October 1988

26. After award of the UNFO contract, Cessna and the Navy "didn't see eye to eye as to what the contract called for" (tr. 1/9). In June or July 1987, Cessna submitted a $40 million equitable adjustment claim [FN3]. A series of fact- finding meetings between the parties took place until the summer of

1988. Thereafter, the parties began a series of negotiation meetings attempting to settle the claim. (Tr. 2/80-81)

27. A negotiation meeting was held on 1-3 August 1988. On 3 August 1988, after two and a half days, the parties "had not made a lot of progress." In "wrap [ping] up," Cessna's Vice President of Finance "raised the subject of when does the Navy intend to exercise the option." (Tr. 2/82-83) Cessna expressed the view that it "interpreted the contract to mean that the option had to be exercised before October 1st" (tr. 2/83). Even though Cessna might have understood, before August 1988, that the Navy had to exercise its option before 1 October 1988, we find that this was the first time Cessna officially took such a position [FN4] and there is no evidence prior to this time that Cessna communicated its interpretation to the Navy and that the Navy acquiesced to Cessna's interpretation. The Navy took Cessna's view under advisement (tr. 2/85). There was no discussion as to the manner in which the option would be exercised (tr. 2/86).

28. The PCO testified that she knew that 1 October 1988 would fall on a Saturday and that she might have "problems administratively exercising the modification [for the option] because [she] wasn't sure that someone would be present to give [her] a funding sheet" (tr. 3/66). The PCO telephoned Cessna's Vice President of Finance on 26 September 1988 "to make prior arrangements to have the option exercised on the 3rd" (tr. 3/66). Cessna's Vice President of Finance called the PCO back and said that "the 3rd would be a problem, and that Cessna would have to have the option on the 1st" (tr. 3/66). The PCO testified that she advised Cessna's Vice President that "I'll fax it to you on the 1st or you'll have it on the 1st" (tr. 3/66). The PCO maintains that she and Cessna's Vice President had an agreement that "I was going to fax the mod to Cessna on the 1st" (tr. 3/68, 3/129-30).

29. The 26 September 1988 telephone call was the first time the PCO discussed with Cessna's Vice President about sending the Navy's option exercise by facsimile (tr. 3/126).

30. The parties met again for negotiations on 27-30 September 1988. Since the Navy had no funds with which to settle the equitable adjustment claim, the parties had explored the possibility of spreading or "amortizing" any settled amount over the option period (tr. 2/94, 98). According to Cessna's Vice President of Finance, by 28 September 1988, it became clear "that we had pretty much reached an impasse" (tr. 2/88). At that point, Cessna inquired what the Navy "intend to do on September 30th?" (tr. 2/88). Having researched the issue, the PCO emphatically took the position that the Navy had until the end of 1 October 1988 to exercise the option, and that the Navy interpreted the "not later than 1 October 1988" language in Special Provision H-6 to mean "the full day of October 1st" (tr. 2/89).

31. At the 28 September 1988 meeting, there was no discussion as to how the Navy's exercise of the option was to be sent or communicated to Cessna (tr. 2/91).

32. On 29 September 1988, Cessna's Vice President of Finance made a presentation to the PCO's immediate supervisor. Option was discussed only in the context of Cessna's offer to settle the equitable adjustment claim. It did not come up in the context of when and how the option was to be exercised (tr. 2/92-93).

33. The last negotiation meeting took place on 30 September 1988 -- the last day of the Fifth Program Year (FY 88) -- with the Head of Contracts, NAVAIR. The meeting took place in the afternoon and lasted for about an hour. (Tr. 3/14, 39) The purpose of the meeting "was to make one final offer to Cessna in an attempt to settle the claim" (tr. 3/14). Offers and counteroffers were exchanged. In the end, the parties agreed that the claim could not be settled (tr. 2/94). At the meeting, Cessna's counsel contended that, in his opinion, "not later

than 1 October 1988 meant by the end of the day on 30 September 1988" (tr. 3/67). The Navy reiterated its position that "not later than 1 October 1988 means at the end of the day on 1 October 1988" (tr. 3/68).

34. As of Friday, 30 September 1988, the Department of Defense Appropriation Act, 1989, Pub. L. 100-463, 102 Stat. 2270 (1988), ("the DoD Appropriation Act") out of which the FY 89 UNFO Program would be funded had passed Congress. That bill, and a number of others, were "just awaiting Presidential signature." (Tr. 3/83) When the parties met on 30 September 1988, the President had not signed the DoD Appropriation Act (tr. 3/16).

35. In anticipation that the President would sign the bill, the PCO had already prepared the modification "ready to go administratively . . . as soon as the Appropriation Bill was signed" (tr. 3/18).

36. Funds for obligation were made available by a "Financial Accounting Data Sheet," a DD Form No. 1140. On 30 September 1988, a NAVAIR budget analyst executed a Financial Accounting Data Sheet, post-dating it to 1 October 1988 with the proviso that "EXECUTION OF THIS DOCUMENT IS CONTINGENT ON CONGRESSIONAL PASSAGE OF THE FY89 APPROPRIATION ACT OR OTHER AUTHORITY." The amount of funds cited on the form was $22,576,253. (R4, tab 7; tr. 4/25). Thus, once the President signed the DoD Appropriation Act, the PCO needed only to sign and transmit the unilateral modification (in this case Modification No. P00027) to exercise the option (tr. 3/18).

37. The Head of NAVAIR Contracts with whom Cessna's Vice President met on 30 September 1988 testified that he tried to make "very, very clear" to Cessna at the meeting that "our [the Navy's] intent was to exercise the option the following day [1 October 1988] . . . if, in fact . . . the President had signed the Appropriation Act, which we had

received some intelligence that that was the expectation" (tr. 4/156).

38. Navy witnesses testified, and we find, that Cessna personnel were told at the 30 September 1988 meeting "to stand by their fax machines on October 1 to receive the option exercise" (tr. 3/40, 68, 143). We find that Cessna knew that the Navy would exercise the option by facsimile if the President signed the DoD Appropriation Act. No one from Cessna told the PCO that an option modification sent to Cessna's headquarters in Wichita, Kansas, on Saturday, 1 October 1988, would not be considered received until Monday, 3 October 1988.

39. At the conclusion of the 30 September 1988 meeting, the PCO stated that the Navy was "going to exercise the option on 1 October." Cessna's Vice President was given "a choice of having somebody pick [the option exercise] up [from NAVAIR offices in Crystal City, Virginia] or fax it to him" (tr. 3/15). Cessna's Vice President indicated that "no one would pick up the mod." According to a Navy witness, Cessna's lack of objections to having the option exercise "faxed," indicated to him that sending the option exercise by facsimile was acceptable. (Tr. 3/16)

40. Cessna's Vice President acknowledged that, in the administration of the UNFO Contract, the PCO and the Program Office "had established a history of faxing modifications" (tr. 2/114). Based on the testimony in the record, we find that the PCO routinely "faxed" Cessna modifications for signature. Correspondence were also "faxed." (Tr. 3/79))

Exercise Of The Option

41. October 1, 1988 fell on a Saturday. Because the option exercise date fell on a weekend, NAVAIR's Contracts Division Director made arrangements with the PCO to be "in

contact with each other" on that day so that the option could be exercised if and when the President signed the DoD Appropriation Act for FY 1989 (tr. 3/42).

42. Late in the morning on 1 October 1988, the Division Director called the Navy's Chief of Information Office (CHINFO) at the Pentagon to find out if the appropriation bill had been signed. No one at CHINFO answered the telephone. The Division Director then called the news department of a local radio station (WMAL). He was told that the DoD Appropriation Act was among the five or six bills signed by the President that morning (tr. 3/42).

43. With this information, the Division Director called the PCO at home and left a message that "she was to exercise the option" (tr. 3/43). Later, the PCO called back to confirm that the President had signed the bill (tr. 3/72).

44. The PCO then went to her office, signed Modification No. P00027, removed the proviso on the Financial Accounting Data Sheet placed there by the NAVAIR budget analyst, and "faxed" the modification and the data sheet to Cessna (tr. 3/72, 152).

45. The PCO then stood at the facsimile machine to make sure that the modification was successfully transmitted. She testified she heard a "beep" which indicated to her that the transmission was successful. She then called Cessna's Vice President at the office "just to see if he was there, and no one answered the telephone." (Tr. 3/72) In the absence of evidence to the contrary, we find Cessna's facsimile machine was running on Saturday, 1 October 1988. The PCO testified that, instead of faxing the option modification to Cessna's office, she "could have sent it [to] the ACO [in Wichita, Kansas] and she [the ACO] could have brought it to [Cessna's Vice President]" (tr. 3/155). We find that this step was not taken because the PCO was led to believe that "faxing" the option modification to Cessna's offices would be acceptable.

46. A log of facsimile transmissions shows that a 7-page document was successfully transmitted to Cessna at 18:19 (6:19 p.m.), 1 October 1988 (exh. G-1, tr. 3/78).

47. The documentary evidence in the record included a cover sheet transmitting to Cessna a 5-page Modification No. P00027 exercising the option, plus a 1-page Financial Accounting Data Sheet. The cover sheet was dated 1 October 1988 with a transmission stamp of "OCT 01 88 18:19." The cover sheet remarked "Attached is the modification exercising the three year multi-year option and providing funding for FY 89" (app. R4, tab 145).

48. Based on the evidence in the record, we find that the Navy exercised the UNFO contract option at approximately 6:00 p.m., 1 October 1988, and that the option, exercised through Modification No. P00027, was successfully transmitted to Cessna in Wichita, Kansas, by facsimile on the same day.

49. Based on the testimony in the record, we find that none of those involved with the UNFO contract at Cessna -- the Vice President of Finance, the UNFO Contract Administrator, and the UNFO Program Manager went to the office on Saturday, 1 October 1988 (tr. 1/79-80, 170, 2/104). According to Cessna's UNFO Contract Administrator, "nobody's going to go to work just for the reason to find out whether or not the fax came in" (tr. 2/59). We find Cessna personnel chose not to be in the office to receive the option.

50. The "faxed" version of Modification No. P00027 was not found by Cessna personnel until Monday morning, 3 October 1988. Recognizing the timing of the option exercise might be important, Cessna's Contract Administrator obtained the following statement, dated 4 October 1988, from the Cessna employee who found the facsimile:

In response to your request that I explain when and how I received the subject document, I am furnishing you with this memo.

On Monday, October 3, 1988, I arrived at my desk at 7:30 A.M. and noticed a bunch of papers in the FAX machine still in the holder where copies fall after coming through the transmission. This machine is adjacent to my desk.

I looked at the papers and identified it as one large document addressed to Carl Miller, so I stapled it together and put it in Carl's box in the Accounting Department for his secretary to pick up.

Later in the same morning you (Terry) asked me if I had removed the subject document from the FAX machine. I recognized the document as being the same one and related the facts to you that I have written above.

(App. R4, tab 146; see also exh. A-2, stip. pp 1-7)

51. Cessna's Vice President of Finance became aware sometime during 3 October 1988 that the Navy had exercised the UNFO contract option (tr. 2/106).

52. In the meantime, an assistant to the PCO called Cessna's Contract Administrator to inquire whether Cessna had "received the fax and was there any problem." The PCO's assistant was told "yes we had the fax and that yes it might be a problem, that in fact Cessna might even take legal action over it." (Tr. 1/175) This prompted an "angry" call from the PCO to Cessna's Vice President. The PCO testified:

Q. What did you do as a result of Mr. McGlynn telling you this?

A. Well, I was angry because I had had this agreement with Carl Miller and so I called Carl.

Q. Did you get him?

A. Yes.

Q. What did you say to him?

A. And I expressed my anger to him that he and I had an agreement that I would fax the mod to Cessna on the 1st. And he said he didn't want to talk about it.

Q. Did you say anything else to him?

A. Yeah, I said, "Carl, you know, if you had told me that you weren't going to accept the mod, then I could have made other arrangements for you to get the mod. But you never told me that you weren't going to accept it." And he just again said, "I don't want to talk about it."
(Tr. 3/77-78; see also tr. 2/107) Cessna's Vice President did not deny that he had indeed agreed to accept the option exercise transmitted by facsimile. Based on the Vice President's total lack of response to this crucial assertion at the hearing, we find that such an agreement between the PCO and Cessna's Vice President of Finance was made on 26 September 1988 (see findings 28 and 29).

Aftermath Of The Option Exercise

53. On 3 October 1988, Cessna notified its Pensacola personnel that the Navy had exercised the option. Notwithstanding Cessna's view that the option was "improperly" exercised, it directed its on-site personnel "to go ahead and provide services as if it had been exercised properly" (tr. 1/142-43)
54. By letter dated 7 October 1988, Cessna took the position that "the purported modification [exercising the option] is ineffective." The letter stated that Cessna would continue to provide services, but would treat such services to have been provided under the "Changes" clause. Cessna said that it expected to provide the Navy with "a proposal for the continuation of the work." (App. R4, tab 147)
55. Cessna's 7 October 1988 letter raised the issue of whether the Navy could legally structure the option under 10 U.S.C. s 2306(g) as "a three year option" as opposed to "three one year options" (app. R4, tab 147). This issue has been dealt with as part of the Board's decision on the parties' cross-motion for summary judgment. See Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA p 25,912 at 128,893.

56. With respect to the timeliness of the option exercise, Cessna summarized its position as follows:

* * *

It appears that you telecopied the purported modification on October 1, 1988. This was a Saturday and not a normal business day. The document does not appear to have been received in Cessna's message center until approximately 6:00 p.m. on that date. At that time, it was not formally received, because this was not a business day, nor had the company made any agreement with you to receive the document under those circumstances. In fact, the company, represented by me and others subordinate to me, did not receive the telecopy until the start of business on Monday, October 3, 1988, and none of these individuals were aware of the existence of the document until that time.

It is Cessna's position that in order for an option under the subject contract to have been exercised timely, a written exercise of the option would have to have been received by the company during normal business hours within the period of time permitted by the contract for an option exercise. It is also our position that in order for an option exercise under this contract to be effective, it would have to have been exercised not later than October 1, 1988, that is, before funds expired at midnight on September 30, 1988. In other words, even if I or another authorized representative of Cessna had in fact received written notification on October 1, it would still be Cessna's position that the purported option exercise was ineffective.

(App. R4, tab 147)

57. The letter stated further that "Any conversation you may have had concerning the method by which the option would be exercised have [sic] no legal significance. Cessna has never agreed to any method of option exercise other than that

set forth in the contract." We find this passing remark in the letter supported the "faxing" arrangement the PCO discussed with Cessna's Vice President on 26 September 1988, and again on 30 September 1988. As to exercising the UNFO contract option by "faxing" to Cessna the Navy's unilateral option modification (P00027), we have already found that an agreement existed between the PCO and Cessna's Vice President (finding 52).

58. By letter dated 5 December 1988, Cessna proposed to provide UNFO services for the three option years (FYs 89, 90 and 91) for $101,283,517. This proposal included the projected impact costs of alleged constructive changes expected to be incurred during the option years. Cessna stated that, pending resolution of its proposal, it would continue to bill "at the values contained in the expired contract for each line item performed." (App. R4, tab 148)

59. In her letter dated 7 December 1988, the PCO took the position that the UNFO option was properly exercised. She interpreted Special Provision H-6 to mean that "the option could not be exercised past midnight on 1 October 1988." She contended that, in the absence of specific contract instructions as to the method of receipt or who must receive the option modification, a "faxed" modification arriving at Cessna's headquarters at approximately 6:00 p.m., Saturday, 1 October 1988, was an effective exercise of the option. The PCO denied that Modification No. P00027 constituted a change to the contract and instructed Cessna that "[p]erformance in accordance with the contract as modified through P00027 is required." (App. R4, tab 149)

60a. The parties were unable to resolve their dispute. Cessna initiated an action in the United States District Court for the District of Kansas on 10 March 1989. The action sought declaratory judgment under Section 10 of the Administrative Procedure Act, 5 U.S.C. s 702, to the effect that the Navy's exercise of the option was in violation of the Antideficiency

Act, 31 U.S.C. ss 1341-1342, the Apportionment statutes, 31 U.S.C. ss 1511-1519, and Section 8042 of the DoD Appropriation Act, 1989. On 16 January 1990, Cessna filed a motion for leave to supplement its complaint. Paragraph 21 of its supplemental complaint alleged for the first time that the UNFO contract was canceled pursuant to DAR 7-1903.33(d) because "The Navy did not issue a notice of funds availability until October 1, after FY 1990 had already begun" (app. R4, tab 163). By Memorandum And Order of 13 August 1990, the District Court found that Cessna's claim was actually one for money damages in an amount in excess of $10,000. The Court denied the Government's motion to dismiss and ordered that the case be transferred to the United States Claims Court. See Cessna Aircraft Co. v. United States, 744 F. Supp. 260 (D. Kansas 1990).

60b. Cessna submitted a certified claim in the amount of $29,054,615 to the contracting officer on 8 April 1991. By letter dated 24 June 1991, Cessna's Chairman and Chief Executive Officer revised the claim to $25,706,080, to "[correct] an inadvertent error in the bid and development expense rates used in the previously submitted price proposal . . . [and to update] the pricing from the earlier submission." Cessna's claim was recertified as modified.

60c. The contracting officer did not issue a decision within 60 days as required by Section 6(c)(1) of the Contract Disputes Act, 41 U.S.C. s 605(c)(1). Cessna appealed on the basis that its claim was deemed denied pursuant to 41 U.S.C. s 605(c)(5) by notice dated 10 July 1991. The Board docketed the appeal on 11 July 1991. On 21 August 1991, the Government moved to dismiss the appeal on the ground that no contracting officer's decision had been issued. The Board denied the Government's motion on 30 September 1991. Cessna Aircraft Co., ASBCA No. 41396, 92-1 BCA p 24,425.

Post-Contract Services

61. Cessna alleges that the Navy violated the "voluntary services" provision of the Antideficiency Act, 31 U.S.C. s 1342. This provision provides, in relevant part:

> An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law. . . .

62. The 5-year multi-year contract expired at midnight, 30 September 1988. Typically, Saturdays and Sundays were work days at the Pensacola site (tr. 1/88). The Navy would schedule "Remain Overnights" or "RONS." The Navy "would do some cross country training with two or three airplanes that would leave on Friday or early Saturday morning and then return to base on Sunday afternoon" (tr. 1/87-88, 139). Some of the weekend flights were "make up" flights (tr. 3/85).

63. The 1-2 October 1988 weekend was an exception. The Navy had specifically advised Cessna that it would not schedule any flights that Saturday "because the contract funding would end at midnight" (tr. 1/139-40, 86, 138). Cessna was given a flight schedule prior to 30 September 1988 for Monday, 3 October 1988. In anticipation that the option would be exercised, Cessna told its subcontractors "to be at work on Monday morning prepared to fly" (tr. 1/137).

64. Cessna concedes that it was not flying airplanes on 1 and 2 October 1988 (tr. 1/87). Nor were any Navy pilots trained on the simulators (tr. 1/154). We find no evidence that the Navy proposed, directed or encouraged such services to be performed that weekend. Typically, Cessna's people "came in on Sunday afternoon to prepare flights for Monday." Cessna's Deputy Program Manager could not say for sure whether pre-flight preparation was performed on 2 October 1988 (tr. 1/154).

65. Cessna maintains that it continued to provide services on 1 and 2 October 1988. Such services included Cessna and subcontractor personnel being available on an on-call basis (tr. 1/138). Cessna contends that it continued to incur equipment rental and subcontractor costs on 1 and 2 October 1988 (tr. 2/105). We find no evidence that the Navy proposed, directed or encouraged Cessna to incur rental and subcontractor costs.

II. Notice Of Availability Of Funds

66. Among the General Provisions (Section I) checked as included in the UNFO Contract was the "ORDER OF PRECEDENCE" clause, NAVAIR 7-104.56 (1974 OCT). This clause, contained in the contract in full text, reads:

In the event of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the Specifications); (b) General Provisions; (c) the other provisions of the contract whether incorporated by reference or otherwise; and (d) the Specifications and (e) the Contractor's proposal No. CMP-1351.

(R4, tab 1 at 8-15, -24)

67. Schedule Special Provision H-8 provided:

The date within which the Contracting Officer, Naval Air Systems Command, will notify the contractor of the availability of funds sufficient for performance of the requirements for the

Second Program Year (Fiscal Year 1985) is 1 October 1984.
Third Program Year (Fiscal Year 1986) is 1 October 1985.
Fourth Program Year (Fiscal Year 1987) is 1 October 1986.
Fifth Program Year (Fiscal Year 1988) is 1 October 1987.

If the three year option is exercised, the date within which the Contracting Officer, Naval Air Systems Command, will

notify the Contractor of the availability of funds sufficient for performance of the requirements for the

Second Option Year (Fiscal Year 1990) is 1 October 1989.

Third Option Year (Fiscal Year 1991) is 1 October 1990.

(R4, tab 1 at 7-16)

68. Based on the testimony of the PCO who was involved in the early stages of the UNFO contract procurement, we find that he "insisted" upon using 1 October as the date for notifying the contractor of availability of funds because O&MN funds were not available for obligation until 1 October of a new fiscal year (tr. 4/8). Cessna concedes that reading the language "the date within which [the CO] will notify the Contractor of the availability of funds . . . for the Second Option Year . . . is 1 October 1989[, and] Third Option Year is 1 October 1990," by itself, "would say October 1" (tr. 1/195). But, "because the way the funds expired" Cessna interpreted Special Provision H-8 to require notification on 30 September 1989 (tr. 1/191-92, 195).

69. DAR 1-322.6 pertained to "Multi-year Contracting of Services Under Public Law 90-378 [10 U.S.C. s 2306(g)]." DAR 1-322.6(c) specified that "[t]he clauses in 7-1903.33(c) [FN5] and (d) shall be included in all service contracts for the acquisition of services under this paragraph 1-322.6 on a multi-year basis."

70. Among the DAR clauses incorporated by reference as a part of Section I (GENERAL PROVISIONS) of the UNFO Contract was DAR 7-1903.33(d), "CANCELLATION OF ITEMS -- SERVICE CONTRACTS UNDER PUBLIC LAW 90-378 OR 91-142 (1976 JUL)" ("Cancellation Of Items" clause"). [FN6] This clause provided, in pertinent part:

(a) This clause applies only in the event this contract is awarded on the alternate basis for award described in the Schedule as "Multi-Year Procurement."

(b) As used herein, the term "cancellation" means that the Government is canceling, pursuant to this clause, its

requirements for items as set forth in the Schedule for all fiscal years (1 October - 30 September) subsequent to that in which notice of cancellation is provided. Such cancellation shall occur only if the Contracting Officer (i) notifies the Contractor that funds will not be available for contract performance for the next succeeding fiscal year and any subsequent fiscal year; or (ii) fails to notify the Contractor prior to beginning of the next succeeding fiscal year that funds have been made available for performance in the succeeding fiscal year.

* * *

(d) In the event of cancellation pursuant to this clause, the Contractor will be paid, as consideration therefor, a cancellation charge not to exceed the cancellation ceiling described and separately set forth in the Schedule as being applicable at the time of cancellation.

(e) The cancellation charge is intended to cover only expenses incurred by the Prime Contractor or his subcontractor which would have been equitably amortized in the unit prices for the entire multi-year contract period, but which, because of the cancellation are not so amortized. . . . (Emphasis added) (Exh. A-1, tab 9)

71. For each of the Program Years (FY 85 through FY 88) Cessna received the Navy's notices of availability of funds on or after 1 October of the applicable fiscal year (tr. 2/53).

72. For the Second Program Year (FY 85), NAVAIR notified Cessna of the availability of funds for that fiscal year by Modification No. P00006 dated 3 October 1984 (app. R4, tab 137). The notification was sent on 3 October 1984. With respect to this notification, the PCO knew "it was going to be late . . . and asked . . . if [Cessna] had a problem with it." Cessna's Head of Contracts at that time stated that it would not have a problem. (Tr. 4/10-11) For FY 85, "the

Appropriation was late, [and the PCO] didn't get the funds to obligate until the 3rd of October" (tr. 4/14).

73. For the Third Program Year (FY 86), NAVAIR notified Cessna of the availability of funds for that fiscal year by Modification No. P00017 dated 1 October 1985 (app. R4, tab 138). In 1985, the then PCO did not use the fax machine. The notification was put "in the mail on the 1st of October [1985]." (Tr. 4/12-13)

74. For the Fourth Program Year (FY 87), NAVAIR notified Cessna of the availability of funds for that fiscal year by Modification No. P00023 dated 1 October 1986 (app. R4, tab 141). The PCO signed the modification on 1 October 1986, and it was sent to Cessna by mail (tr. 4/15).

75. For the Fifth Program Year (FY 88), NAVAIR notified Cessna of the availability of funds for that fiscal year by Modification No. P00026 dated 1 October 1987 (app. R4, tab 142).

76. For the second through the fifth program years (FY 85 through 88), Cessna did not contend that the Navy's notices of availability of funds were late, or that the base multi-year contract was canceled pursuant to the terms of the "Cancellation Of Items" clause (tr. 3/92, 4/12-15).

77. Special Provision H-8 provided that if the Navy exercised the 3-year option, the date within which the Navy will notify the contractor of the availability of funds for the Second Option Year was 1 October 1989, and for the Third Option Year was 1 October 1990 (finding 67).

78. October 1, 1989, fell on a Sunday. In light of the "legal battle" over the way the 3-year option was exercised the previous year, the PCO called Cessna's Contract Administrator on 28 or 29 September 1989 "to make arrangements to have [Cessna] receive th[e] fax on a weekend so that [Cessna] wouldn't contest it again" (tr. 1/187-88).

79. The PCO followed up with a letter dated 29 September 1989 which stated:

1. Pursuant to Special Provision H-8 "Multi-year Procurement" of Contract N00019-83-C-0090, you are to be notified in writing by 1 October 1989 of the availability of funds for fiscal year 1990. A facsimile of the contract modification will be sent to you on 1 October 1989. Please notify me by the close of business on 29 September 1989 if this arrangement is not acceptable to you. . . .

(App. R4, tab 156)

80. Cessna responded the same day. Its response stated:

In response to the ref. letter and due to your advance coordination, Cessna will not contest that written notice was received on 1 October 1989 if a message is received on our facsimile machine on 1 October 1989 regardless of whether anyone is present at Cessna on 1 October 1989. This shall in no way prejudice Cessna's position in the current District Court case concerning last year[']s illegal exercise of the three year option.

(App. R4, tab 157) Cessna's Contract Administrator explained what his letter meant was:

We would not contest that the fax was sent on 1 October just because we didn't see it until 2 October. But we were not agreeing that we would consider it a timely exercise of the option if it came on 1 October.

(Tr. 1/189)

81. Notice of availability of funds for the Second Option Year (FY 90) was provided by Modification No. P00034 faxed to Cessna on 1 October 1989 (app. R4, tab 158). We find that the notice was received at Cessna's offices on 1 October 1989. The notice was issued when the PCO found out that a continuing resolution had been passed (tr. 1/196). Cessna acknowledged that "[w]e received it. It was on our fax machine when we came to work on Monday, October the 2nd 1989" (tr. 1/190). [FN7]

82. October 1, 1990 fell on a Monday, a normal business day. Notice of availability of funds for the Third Option Year (FY 91) was provided by Modification No. P00038 dated 1 October 1990 (app. R4, tab 174). We find that the notice was received at Cessna's offices on 1 October 1990.

83. Relying on DAR 7-1903.33(d)(b)(ii)(henceforth sometimes referred to as the "automatic cancellation provision"), Cessna contends that the UNFO Contract was canceled as of 1 October 1989 because:

[DAR 7-1903.33(d)(b)(ii)] says to me that if prior to the end of the funding of the first year of the option, which was September 30th 1989, if they hadn't notified us that they had additional funds for the next fiscal year then the government effectively had cancelled the contract.

(Tr. 1/194)

Deviation

84. DAR 1-109.1 provided that "it is the responsibility of contracting officers to request . . . deviations whenever they are required in the best interest of the Government." DAR 1-109.1 provided that, "For the purpose of this paragraph, a deviation shall be considered to be any of the following:"

(i) when a contract clause is set forth in ASPR for use verbatim, use of a contract clause covering the same subject matter which varies from the ASPR coverage, or use of a collateral provision which modifies either the clause or its prescribed application constitutes a deviation. . . .

(Exh. A-1, tab 7)

85. DAR 1-109.2 provided that deviations from DAR affecting only one contract may be authorized in accordance with Departmental procedures provided (i) such circumstances justify a deviation; and (ii) written notice of such deviation, describing its nature and the basis for its

justification, is furnished to certain DoD and other military offices. (Exh. A-1, tab 7)

86. As for the Navy, departmental procedures referenced in DAR 1-109.2 authorizing deviations from DAR affecting only one contract were set forth in the Navy Procurement Directives ("NPD"). NPD 1-109.2 provided, in part:

> The Chief of Naval Material is authorized to grant or deny requests for deviation from the mandatory provisions of DAR or other DOD directives when the deviation affects only one contract or a single transaction in connection with one contract. . . .

(App. R4, tab 75)

87. NPD-1-109.5 stated that "[i]n originating or forwarding a request for deviation, the request shall be signed by the Head of the Procuring Activity, by the Director of Contracts or by the Deputy Director of Contracts." NPD 1- 109.55 described the deviation control procedures the Chief of Naval Material was required to follow:

> A record of all approved deviations will be maintained by the Chief of Naval Material (MAT 021). Each approved deviation shall be assigned a control number consisting of fiscal year and serial number, e.g., Deviation Control No. 68-1. This control number shall be included in the document authorizing the deviation and will be cited in all future references to this deviation.

(App. R4, tab 75)

88. During 1982-1983, the Chief of Naval Material had delegated the authority to approve one-time deviations to the Deputy Chief of Naval Material (tr. 4/75). In the early 1980's, when the Navy was involved in a "massive buildup," senior contracting analysts from the Chief of Naval Material's Office would be "involved in the [procurement] process" (tr. 4/79). This provided opportunities for identifying requirements for deviations in the early stages of the procurement process. Once a need for a deviation request was

identified, documentation would "flow." Where a determination was made that no request for deviation was necessary, "no documentation would flow" (tr. 4/80). There is no evidence that a request for deviation from DAR 7-1903.33(d) prepared in accordance with NPD 1-109.5 was forwarded to the Chief of Naval Material. There is no evidence that the Chief of Naval Material approved a request for deviation from DAR 7-1903.33(d) in accordance with the record-keeping requirements of NPD 1-109.55.

89. The Navy's Acquisition Plan (No. P42-32-0-20) prepared in 1982 showed that the Navy was aware that "[a] deviation from DAR 1-1502 [had to] be requested in order to allow the program to extend for three (3) option years beyond the five year maximum currently authorized by the DAR." (App. R4, tab 110 at 10) This Acquisition Plan did not mention that a deviation from DAR 7-1903.33(d) was needed as well (tr. 2/179).

90. A "Business Clearance Memorandum" is "a document that the contracting officer uses to obtain authority to enter into a contract" (tr. 2/225, 180). In the Navy's 4 February 1983 Business Clearance Memorandum, there was a reference to the deviation from DAR 1-1502 (app. R4, tab 124, Section IV at p 5, tr. 2/182). The memorandum, however, made no reference to a need for deviation from DAR 7-1903.33(d) (tr. 2/182-83).

91. Based on the evidence in the record, we find that the Navy was not aware that a request for deviation from DAR 7-1903.33(d) was needed, and, accordingly, no request for deviation from the "Cancellation Of Items" clause was made (see exh. A-1, stip. p 15).

DECISION

I. OPTION

Cessna contends that the Navy's exercise of the option was untimely for two alternative reasons. First, Cessna contends that the contract required the Navy to exercise the option by 30 September 1988, and the Navy did not attempt to exercise the option until 1 October 1988. Second, Cessna contends that even if the contract allowed for the option to be exercised on 1 October 1988, the Navy's option exercise nonetheless was untimely because it was not reviewed by Cessna personnel until 3 October 1988. (Br. at 52)

Date Of Option Exercise (Count V)

Special Provision H-6 of the contract provided that "the option for the three option years will be exercised, if at all, in writing by a unilateral modification to this contract issued by the Contracting Officer, Naval Air Systems Command, not later than 1 October 1988" (finding 10). Notwithstanding unanimous interpretation by all Cessna contract personnel that Special Provision H-6 required the option to be exercised not later than 30 September 1988, the proper interpretation of the contract as to the time and manner of option exercise is a question of law. See, e.g., International T & T., ITT Defense Com. Div. v. United States, 453 F.2d 1283, 1288 (Ct. Cl. 1972) ("ITT"). We look first to the plain language of the contract to resolve any questions of contract interpretation. Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991); Aleman Food Services, Inc. v. United States, 994 F.2d 819, 822 (Fed. Cir. 1993). We cannot interpret the plain language "not later than 1 October 1988" to mean "not later than 30 September 1988" as Cessna has urged.

In arguing that Special Provision H-6 should be interpreted to mean that the option must be exercised not later than 30 September 1988, Cessna contends that "clause H-6 is not to be read in isolation; rather, it must be read in the context of the entire contract" (br. at 53). In this regard, Cessna

maintains that Special Provision H-6 "expressly allowed for an earlier exercise date" (br. at 53). Cessna says that since the UNFO contract was funded with O&MN funds, and since such funds expired at midnight 30 September 1988, its interpretation is "consistent with other provisions of the contract and does not render them meaningless" (br. at 54).

We agree that Special Provision H-6 allowed for an earlier exercise date. That, however, did not render the option exercised on 1 October 1988, within the time specified in the option provision, ineffective. Defined at its most basic level, "an option is simply a contract to keep an offer open." Williston, A Treatise On The Law Of Contracts, s 5:15 (4th ed. 1990); RESTATEMENT (SECOND) OF CONTRACTS s 25. Here, Cessna and the Navy contracted that Cessna would keep its offer open through 1 October 1988. This offer was irrevocable through 1 October 1988. Expiration of the UNFO contract or O&MN funding had no bearing on the parties' contract with respect to the prescribed period within which the Navy was entitled to unilaterally accept Cessna's continuing offer which was the option.

In support of its position that the option must be exercised before the UNFO contract expired, Cessna relies on Contel Page Services, Inc., ASBCA No. 32100, 87-1 BCA p 19,540. In Contel Page, the Army entered into a telephone operation and maintenance contract with Contel Page. The contract was for a 7-month base period, and it provided for 4 additional 12-month option periods. The option periods, as in the case before us, were structured to coincide with the Government's fiscal year (i.e., beginning 1 October and ending 30 September). The contract included an option clause which provided, "This contract is renewable, at the option of the Government, by the Contracting Officer giving written notice of renewal to the Contractor within the period specified in the schedule." Unlike the Schedule in the case before us, the contract schedule in Contel Page specified no renewal period.

One week prior to expiration of the first option year, the contracting officer sent Contel Page a letter (dated 23 September 1985) enclosing an unsigned bilateral modification purporting to exercise the option for FY 86. Contel Page did not want to continue its loss contract. It waited until after the beginning of the new fiscal year to advise the Army (by mailgram dated 5 October 1985) that it considered the unsigned bilateral modification to have been an ineffective option exercise. In determining, as a threshold issue, the date on which the second year option must be exercised, we said at 98,735:

> The option clause . . . states that the option must be exercised within the period stated in the schedule. Since no period is stated in the schedule, the option must be exercised during the period of performance then in effect. Moore's Cafeteria Services, Inc., ASBCA No. 28441, 85-3 BCA p 18,187; Chemical Technology, Inc., ASBCA No. 21863, 80-2 BCA p 14,728. Thus, the second year option had to be exercised prior to 1 October 1985. [Emphasis added]

Contel Page is distinguishable. Unlike Contel Page, Special Provision H-6 of the Schedule specified that the UNFO option will be exercised, if at all, "not later than 1 October 1988" (finding 10). Cessna agreed to this provision when it signed the UNFO contract in 1983. Cessna is bound by it. Reliance Ins. Co. v. United States, 931 F.2d 863, 866 (Fed. Cir. 1991) (contractor who enters into contract with full knowledge of its provisions must be bound by them).

Cessna also relies on TECOM, Inc., IBCA No. 2970a-1, 95-2 BCA p 27,607, for the proposition that "options must be exercised before the contract expires" (see Cessna letter of 21 June 1995). TECOM, too, is distinguishable. The TECOM contract required written notice of option exercise be given within 30 calendar days of the "expiration date set forth in Section F911." That date -- 28 February 1991 --happened to coincide with the base contract expiration date. The contract

expiration date in and of itself did not dictate the period within which notice was required to be given.

Even though the language of Special Provision H-6 allowed exercise of the UNFO option prior to 1 October 1988, under the circumstances of this case, the Navy could not have exercised the option prior to expiration of the basic multi-year contract, i.e., on or before 30 September 1988. We have found that the UNFO contract was funded with O&MN funds (finding 6). O&MN funds are expiring annual funds. Such funds for contract work beginning in a new fiscal year are not available for obligation until the start of the new fiscal year (finding 7). In this case, O&MN funds for UNFO services covered by the First Option Year (FY 89) were not available for obligation until the President signed the DoD Appropriation Act for FY 89 (finding 41). The Government is prohibited from entering into a contract before a sufficient appropriation of funds is made. Government Systems Advisors, Inc. v. United States, 13 Cl. Ct. 470 (1987), aff'd on other grounds, 847 F.2d 811 (Fed. Cir. 1988).

As awarded in May, 1983, the UNFO contract initially included the "Availability Of Funds" clause. This clause would have enabled the Navy to exercise the UNFO option prior to 1 October 1988 contingent upon the availability of appropriated funds from which payment for contract purposes can be made. (Finding 11) This right was not available to the Navy here. The Navy in Modification No. P00001 issued in February, 1984, deleted the Availability Of Funds clause. Deletion of the clause meant that the Navy had no alternative but to exercise the UNFO option on 1 October 1988 when O&MN funds for FY 89 became available for obligation.

Cessna argues that, notwithstanding the absence of the Availability Of Funds clause, the clause ought to be read into the contract by operation of law. G.L. Christian & Associates v. United States, 320 F.2d 345 (Ct. Cl. 1963). There is no

need to engage in this hypothetical exercise. In the first place, the Navy and Cessna specifically agreed, by Special Provision H-6, that the option could be exercised no later than 1 October 1988. Thus, the Navy's right of option exercise survived the expiration of the basic contract. And, secondly, the Navy did exercise the option within the time provided in the contract. Thus, there is no need to speculate whether exercise of the option on 30 September 1988 with the re-introduction of the removed Availability Of Funds clause would render the option ineffective. See Lear Siegler Inc., Management Services Division, ASBCA No. 30224, 86-3 BCA p 19,155; J.E.T., Inc., ASBCA No. 26135, 82-2 BCA p 15,986 (insertion of an Availability Of Funds clause, limiting the Government's liability for payment, rendered the option exercise ineffective).

We conclude that under Special Provision H-6, the Navy had until midnight, 1 October 1988, to exercise the UNFO option. We conclude that, having exercised the UNFO option on 1 October 1988, the option was timely exercised.

Receipt Of The Option Exercise (Count V)

It is well established that exercise of an option is effective only upon receipt. Dynamics Corp. of America v. United States, 389 F.2d 424, 431-432 (Ct. Cl. 1968); Western States Management Services, Inc., ASBCA Nos. 47490, 38237, 92-2 BCA p 24,921. We have found that the Navy executed the UNFO option at approximately 6:00 p.m., Saturday, 1 October 1988, and the option modification was successfully transmitted to Cessna's headquarters in Wichita, Kansas, by facsimile on the same day (finding 48). October 1, 1988, fell on a Saturday (finding 41). The "faxed" version of Modification No. P00027 was not found by Cessna personnel until the morning of the following Monday, 3 October 1988 (finding 50). Cessna's Vice President became aware

sometime during 3 October 1988 that the Navy had exercised the UNFO contract option (finding 51).

Cessna argues alternatively that "[i]f the Board interprets the contract as allowing the Navy to exercise the option on October 1, [1988,] the option exercise still was ineffective because it was not received by Cessna until October 3 [, 1988]" (br. at 59).

We determine first whether transmission of the unilateral modification exercising the option by facsimile constituted exercise of the option "in writing" as required by Special Provision H-6. This was not the first time contractual documents were transmitted by the parties by facsimile. We have found in the administration of the UNFO contract, there was an established practice of "faxing modifications" (finding 40). In any event, Cessna has not taken the position that "faxing" the option modification was impermissible under Special Condition H-6. A New York court indicates in a 1988 decision that transmission by facsimile has become the overwhelming method of choice in today's world:

These machines have been around for many years, but recently they have become so sophisticated and user-friendly that they have become overwhelmingly the method of choice for the transmission of documents in today's world. Indeed their use has become so widespread that business stationary now commonly carries a "fax" telephone number in addition to an ordinary one, and, in common usage, "fax" has been converted into a verb as well as an adjective and noun. Calabrese v. Springer Personnel of New York, 534 N.Y.S. 2d 83 (N.Y. Civ. Ct. 1988). We conclude, in this case, exercise of the option by transmission of a unilateral modification by facsimile constituted exercise of the option "in writing."

Although Saturdays and Sundays are not normal business days, we know of no prohibition against exercising an option or receiving an option exercise on a weekend where the contracting parties specifically so agreed. There are obvious

communication difficulties and problems associated with notification but they can be worked out in advance. We reject the notion that an optionor (Cessna in this case) can choose to frustrate an otherwise successful exercise of an option by avoiding receipt of the option modification, or, as in this case, choosing not to be physically in its offices to receive it (see finding 49).

Based on the evidence in the record, we conclude that, in any event, Cessna is estopped from contending that the option modification was not received on 1 October 1988. Four elements must be present in establishing estoppel:

(1) The party to be estopped [Cessna] must know the facts; (2) he [Cessna] must intend that his conduct shall be acted on or must so act that the party asserting the estoppel [the Navy] has a right to believe it is so intended; (3) the latter [the Navy] must be ignorant of the true facts; and (4) he [the Navy] must rely on the former's [Cessna's] conduct to his injury.

Emeco Industries, Inc. v. United States, 485 F.2d 652, 657, 202 Ct. Cl. 1006, 1015 (1973).

In anticipation that 1 October 1988 would fall on a Saturday, the PCO called Cessna's Vice President to make arrangements for exercise of the option (finding 28). Based on unrebutted evidence in the record, we have found that the PCO and Cessna's Vice President reached agreement on 26 September 1988 that sending the option modification by facsimile to Cessna's offices would be acceptable (findings 28, 29, 52). At the 30 September 1988 negotiation meeting, Cessna was told in no uncertain terms that subject only to the President signing the DoD Appropriation Act for FY 89, the Navy would exercise the option on 1 October 1988 (finding 37). Cessna's was told "to stand by their fax machines on October 1 to receive the option exercise" (finding 38). Notwithstanding these arrangements, no one from Cessna told the PCO that an option modification sent to Cessna's

offices on Saturday, 1 October 1988, would not be considered received until 3 October 1988, the following Monday (finding 38).

In this case, Cessna knew (1) that subject only to the President signing the DoD Appropriation Act for FY 89, the Navy would exercise the option on Saturday, 1 October 1988 by "faxing" a unilateral modification to its offices, (2) that in light of the 26 September 1988 agreement and the 30 September 1988 discussions, the Navy had the right to expect that transmitting the option modification to Cessna's offices would be acceptable, and (3) that the Navy had no reason to believe that sending the option modification to Cessna's offices on 1 October 1988 would not be considered received on that date. The evidence also shows that had the PCO been told of the position Cessna now takes, instead of faxing the option modification to Cessna's offices, the PCO "could have sent it [to] the ACO [in Wichita, Kansas] and she [the ACO] could have brought it to [Cessna's Vice President]" (finding 46). In that case, there would be no question that receipt of the option modification occurred on 1 October 1988. The Navy has proved to our satisfaction that all of the elements required for estoppel against Cessna on the issue of timely receipt of the option had been satisfied. We conclude that alternatively, Cessna is estopped from contending that it did not receive the UNFO option modification on 1 October 1988.

Post-Contract "Voluntary" Services (Count VI)

The basic UNFO contract expired at midnight, 30 September 1988. The option was exercised and received by Cessna at approximately 6 p.m., 1 October 1988. Thus, no contract was in existence between midnight 30 September 1988 and when Cessna received the option exercise 1 October 1988.

Cessna contends that "If the Board decides that the option could be exercised on October 1, and also decides that Cessna received the option on October 1, then Cessna contends the option exercise was ineffective because the contract required Cessna to provide voluntary services in violation of the Antideficiency Act" (emphasis added) (br. at 65). Cessna further asserts: "The contract was unfunded during October 1, and reading clause H-6 as allowing the option to be exercised on October 1 would mean that Cessna was required to provide voluntary services to the Navy. Because this would violate the Antideficiency Act, the option exercise was ineffective." (Emphasis added) (Br. at 70)

We can find no contract provision that required Cessna to provide UNFO and related services after the contract expired. Reading Special Provision H-6 to permit the option to be exercised on 1 October 1988 does not in any way require Cessna to provide voluntary services to the Navy.

The Antideficiency statute Cessna alleges the Navy violated is 31 U.S.C. s 1342 (see finding 61). As applied to government contractors, the General Accounting Office (GAO) has considered an arrangement in which a contracting officer "proposes to leave existing contract in effect, at least tacitly encourage continued performance, receive the benefits of performance, but at the same time require contractors to assume the risk of nonpayment" to be in violation of the voluntary services provision of the Antideficiency Act, 31 U.S.C. s 1342. (Emphasis added) See 55 Comp. Gen. 768, 778 (1976); GAO, Principles of Federal Appropriations Law, ch.6, at 6-68 (2d ed. 1992).

Cessna admitted that no flight or simulator training was conducted during the weekend of 1-2 October 1988 (finding 64). Because of the expiration of the UNFO contract, the Navy, in departing from normal practice, scheduled no training flights that weekend (finding 63). Cessna claims that its people and its subcontractors were available "on call" that

weekend (finding 65). Cessna also claims that it continued to incur rental and subcontractor costs. We have found that Cessna's contracts with at least its major subcontractors were also structured on the basis of a base contract for 5 years plus one option for 3 years (finding 21). Thus, Cessna should have been able to limit its liability to its subcontractors. In any event, there is no evidence that the Navy proposed, directed or encouraged Cessna to incur rental and subcontractor costs (finding 65). To the extent Cessna did not move people and equipment out of Pensacola, Cessna chose not to do so. The Navy did not require Cessna to assume the risk of nonpayment. Cessna assumed it itself.

We conclude there is no basis for holding that the UNFO contract, in and of itself, was illegal for requiring voluntary services in violation of 31 U.S.C. s 1342. Furthermore, we conclude there is no factual basis in support of Cessna's allegation that the PCO violated 31 U.S.C. s 1342.

II. Notices Of Availability Of Funds (Counts VIII & XI)

Special Provision H-8 provided that "the date within which" the NAVAIR Contracting Officer will notify Cessna of the availability of funds sufficient for performance of the requirements for the "Second Option Year . . . is 1 October 1989 . . . Third Option Year . . . is 1 October 1990" (finding 67). The PCO notified Cessna of the availability of funds for the Second Option Year on 1 October 1989 by Modification No. P00034 (finding 81). She notified Cessna of the availability of funds for the Third Option Year on 1 October 1990 by Modification No. P00038 (finding 82).

Special Provision H-8 appears inconsistent with the "automatic cancellation provision" of the "Cancellation Of Items" clause, prescribed at DAR 7- 1903.33(d), and incorporated by reference as part of Section I of the contract. The term "cancellation" is defined in that clause to mean

"that the Government is canceling, pursuant to this clause, its requirements for items as set forth in the Schedule for all fiscal years (1 October-30 September) subsequent to that in which notice of cancellation is provided. Such cancellation shall occur only if the Contracting Officer . . . (ii) fails to notify the Contractor prior to beginning of the next succeeding fiscal year that funds have been made available for performance in the succeeding fiscal year." (emphasis added) (finding 70).

We take notice that 30 September 1989 was prior to the beginning of the Second Option Year (FY 90) which began 1 October 1989. And, 30 September 1990 was prior to the beginning of the Third Option Year (FY 91) which began 1 October 1990. Cessna contends that if we decide that the option was timely exercised and was not illegal, the contract was nevertheless canceled at the end of the First Option Year and at the end of the Second Option Year "because the contracting officer did not provide timely notification of funds availability" (br. at 70).

Cessna argues first that "Clause H-8 can be read consistently with the Cancellation of Items clause and other portions of the contract by interpreting Clause H-8 as requiring that notice of funds availability be provided on September 30 at the latest" (br. at 71). We look once again to the plain language of the contract to resolve any questions of contract interpretation. Gould and Aleman Food Services, supra. We cannot interpret the plan language of "within" 1 October 1989 or 1990 in Special provision H-8 to mean "within" 30 September 1989 or 1990 as Cessna has urged. Special provision H-8 is even more specific than Special Provision H-6 which permitted exercise of the UNFO contract option "no later than 1 October 1988." There is no room for doubt that "within 1 October" means any time on 1 October. Selection of the 1 October date was deliberate. The UNFO contract was funded with O&MN funds which would not

have been available for obligation until the beginning of each fiscal year covered by the contract (finding 7).

Cessna argues next that "If the Board determines not to interpret clause H-8 as requiring notice by September 30, then the Board must give precedence to the Cancellation of Items clause over clause H-8" (br. 73).

The trouble with this argument is that the Order Of Precedence clause gives precedence, in the event of an inconsistency, to "the Schedule" provisions over the "General Provisions" (finding 66). Thus, Special Provision H-8, a clause within "the Schedule" would have precedence over the "Cancellation Of Items" clause, a General Provision. The Order Of Precedence clause was included in the UNFO contract for just the sort of inconsistency the parties encountered here. We simply cannot ignore this built-in method for resolving inconsistency in contract terms. The Order Of Precedence clause was a part of the UNFO Contract. Cessna is bound by it. Reliance Ins. Co., supra.

Cessna argues that the "Cancellation Of Items" clause was a standard DAR clause required to be included in the UNFO contract. As such, Cessna contends that it could not be modified by Special Provision H-8 without obtaining a deviation pursuant to DAR and NPD regulations (see findings 84-87). We have found that the Navy was not aware that a deviation was required. Consequently, no request for deviation was made, and no deviation from the DAR "Cancellation Of Items" clause was authorized (findings 89-91).

Even assuming that, in the absence of an approved deviation, Special Provision H-8 was ineffective in modifying DAR 7-1903.33(d)(b)(ii) -- the "automatic cancellation provision" -- we conclude that Cessna had through a course of dealing, considered notices of funds availability given on 1 October to have satisfied the contractual notice requirements.

RESTATEMENT (SECOND) CONTRACTS (1981) s 223 states:

s 223 Course of Dealing

(1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

Furthermore, course of dealing "may determine the meaning of language or it may annex an agreed but unstated term . . . nor is it required that the course of dealing be consistent with the meaning the agreement would have apart from the course of dealing." RESTATEMENT (SECOND) CONTRACTS s 223 comment b at 158.

The evidence shows that for the Second through the Fifth Program Years (FY 85 through 88) the Navy provided notices of availability of funds on or after 1 October (findings 72-75). For these years, Cessna did not contend that the Navy's notices of availability of funds were late, or that the base multi-year contract was canceled pursuant to the terms of the "Cancellation Of Items" clause (finding 76). The conduct of the parties is of great weight in the interpretation of a contract. A.R.F. Products, Inc. v. United States, 388 F.2d 692, 696, 181 Ct. Cl. 1176, 1182-83 (1967).

Cessna's reliance on the automatic cancellation provision of the DAR clause -- DAR 7-1903.33(d)(b)(ii) -- as governing the date the Navy's notices of funds availability must be given is of recent vintage, having surfaced for the first time as an issue in 1990, over 5 years into the contract, when Cessna's attorneys supplemented its complaint regarding the option exercise filed in the Kansas District Court (see finding 60).

We conclude that the course of dealing between the parties established that notice given on 1 October satisfied the contractual notice requirements. Therefore, the case before us does not present a directed change situation where equitable adjustment is appropriate. Cf. International T & T, ITT Defense Com. Div. v. United States, 453 F.2d 1283 (Ct. Cl. 1972).

Even if we were to hold that the Navy failed to provide timely notices of availability of funds for the Second (FY 90) and third (FY 91) Option Years, there is no basis for any additional payment under the Cancellation Of Items clause.

The Cancellation Of Items clause (DAR 7-1903.33(d)) provides its own mechanism for determining payment in the event of cancellation. Subparagraph (d) of that clause specifically limits the cancellation charge to the cancellation ceiling set out in the contract (in this case Special Provision H-98) [FN8]. Subparagraph (e) of the clause further limits the cancellation charge "to cover only expenses incurred . . . which would have been equitably amortized in the unit prices for the entire multi-year contract period, but which, because of the cancellation, are not so amortized . . . ." (Finding 70)

The UNFO contract (including the 3-year option) ran for a total of 8 years. Cessna amortized its non-recurring expenses over the entire 8-year period. Cessna has not shown that it still had unamortized expenses remaining to be paid even if the Second and Third Option Year are considered cancelled. (Finding 17)

For the foregoing reasons, this appeal is denied.

PETER D. TING
Administrative Judge
Armed Services Board of Contract Appeals

I concur
ALAN M. SPECTOR
Administrative Judge

Acting Chairman
Armed Services Board of Contract Appeals

I concur
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board of Contract Appeals
I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 43196, Appeal of Cessna Aircraft Company, rendered in conformance with the Board's Charter.

EDWARD S. ADAMKEWICZ

Recorder, Armed Services

Board of Contract Appeals

FN1. 10 U.S.C. s 2306(g)(1) provides, in relevant part:

* * *

(g)(1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated -

* * *

(C) specialized training necessitating high quality instructor skills (for example, pilot and other aircrew members; foreign language training); and

* * *

(2) In entering into such contracts, the head of the agency shall be guided by the following principles:

* * *

(B) Consideration shall be given to the desirability of obtaining an option to renew the contract for a reasonable period not to exceed three years, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.

FN2. There was disagreement within the Office of the General Counsel of the Navy as to the appropriateness of using 10 U.S.C. s 2306(g)(1) as authority for the multi-year procurement of contractor serviees for the UNFO Program (see app. R4, tab 94). Neither party raised the appropriateness of 10 U.S.C. s 2306(g)(1) as an issue.

FN3. The claim resulted in two Board decisions: Cessna Aircraft Co., ASBCA No. 37726, 95-1 BCA p 27,373 and Cessna Aircraft Co., ASBCA No. 48118, 95-1 BCA p 27,560.

FN4. Cessna's UNFO Project Engineer/Program Manager testified that he understood that the Navy "had to exercise the option by September the 30th 1988" (tr. 1/67). This understanding was based on his reading of Special Provision H-6 "and the rest of the contract . . . [b]ecause the contract funds expire[d] on the basic five year contract on September the 30th" (tr. 1/68). The record shows that in an internal memorandum written in 1986, Cessna's Program Manager wrote "Three option years FY 89 through 91 must be exercised before October 1, 1988" (app. R4, tab 140; tr.

1/70-71). Cessna's on-site Deputy Program Manager (tr. 1/120), a retired naval officer, testified that he too, understood that the option "had to be exercised prior to the 1st of October 1988." His understanding was based on his knowledge that the contract "was funded with O&MN funds . . . [and] they run out at the end of . . . the government's fiscal year, which is midnight the 30th of September" (tr. 1/122). This interpretation was developed when the Deputy Program Manager first reviewed the contract (tr. 1/123). Cessna's UNFO Contract Administrator had the same understanding. He acknowledged that his understanding was influenced by his knowledge of the contract expiration date:

> . . . just reading this clause [H-6] all by itself I would have thought that they had through 1 October '88 to exercise the option, but with knowledge about the funding on the contract and the fact that the base five year contract expired September 30th I believe that they had to exercise it by September 30th. (Tr. 1/162)

The Contract Administrator first joined the UNFO Program Office in January 1985. It is not clear when he developed his interpretation (tr. 1/160-61). Finally, Cessna's Vice President of Finance also interpreted Special Provision H-6 to provide "until . . . midnight, September 30th, by or before October 1st" to exercise the option. His interpretation was based on his understanding that "[t]he contract is funded with fiscal year funds, and the Government's contract fiscal year ends on September 30th." (Tr. 2/79) The Vice President's interpretation was developed in June or July, 1988 (tr. 2/99).

FN5. DAR 7-1903.33(c) set out the "LIMITATION OF PRICE AND CONTRACTOR OBLIGATION -- SERVICE CONTRACTS UNDER PUBLIC LAW 90-378 OR 91-142 (1976 JUL)" clause.

FN6. At one point in the proceeding of this appeal, there was uncertainty as to whether DAR 7-1903.33(d) was the right clause to have been included in the UNFO contract. This uncertainty has now been removed. In our decision issued 12 March 1993, we denied Cessna's motion for summary judgment on Counts VIII and XI. During oral argument on Cessna's motion held on 10 December 1992, the Navy for the first time raised the prospect that the clause prescribed at DAR 7- 1903.33(d) might have been the wrong clause to have been included in the contract, and that this clause applied "to a contract performed outside the United States." See Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA p 25,912 at 128,940-905. In 1986 Congress amended 10 U.S.C. s 2306 by permitting DoD to enter into multi-year contracts for, among other services, "specialized training necessitating high quality instructor skills," "to be performed outside the forty-eight contiguous States and the District of Columbia. Pub L. 90-378, 82 Stat. 289. In 1981, Section 909(b)(1) of the DoD Authorization Act, 1982, was enacted into law. Section 909(b)(1) amended 10 U.S.C. s 2306 "by striking out 'to be performed outside the forty-eight contiguous States and the District of Columbia' in subsection (g)." In March, 1982, the DAR Council amended DAR 1-322.6(a) by deleting the reference to Public Law 90-378, and deleting the phrase "to be performed outside the 48 contiguous States and the District of Columbia" (exh. A-1, stip.p 4). On 1 October 1982, the Navy issued the RFQ for the UNFO contract. Section I of the RFQ identified various clauses incorporated by reference. Among the clause checked by Navy personnel as being incorporated by reference was DAR 7-1903.33(d) entitled "Cancellation of Items - Service Contracts Under Public Law 90-378 or 91-142 (1976 JUL)." On 10 May 1983, the Navy awarded the contract to Cessna. Section I of the contract identified clauses checked by the Navy as being incorporated by reference, including DAR 7-1903.33(d)

(1976 JUL). (Exh. A-1, stip. p 13) At the time the hearing of this appeal began on 21 September 1993, the parties had stipulated that "DAR 7-1903.33(d) was the correct clause and DAR 7-1903.33(b) was the incorrect clause to use for multi-year service contracts issued pursuant to 10 U.S.C. s 2306(g) after Public Law 97-86 was enacted," and that "[d]uring all relevant time, DAR 7-1903.33(d) was not changed by the DAR Council" (exh. A-1, stip. pp 14 and 17).

FN7. On 16 January 1990, Cessna moved to amend its complaint filed in the Kansas District Court action. Count IV of Cessna's supplemental complaint alleged in p 21 that the UNFO contract was canceled pursuant to DAR 7- 1903.33(d) because "[t]he Navy did not issue a notice of funds availability until October 1, after FY 1990 had already begun." (App. R4, tab 163)

FN8. Special Provision H-9, "Cancellation Ceiling," as amended by Modification No. P00001, provided, in part, as follows:

* * *

$29,000,000.00 - applicable if three year option is exercised and if second and following option years are cancelled.
$26,500,000.00 - applicable if three year option is exercised and if third option year is cancelled

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-1185

THE CESSNA AIRCRAFT COMPANY,

Appellant,

v.

John H. Dalton,
SECRETARY OF THE NAVY,

Appellee.

ORDER

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for reheating in banc and response having been referred to teh circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for reheating in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on March 6, 1998.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: February 27, 1998

By_____
Alex Van Veen
Staff Law Clerk

cc: MICHAEL T. JANIK
GEOFFREY C. COOK

SIXTEENTH CONGRESS. Sess. I. Ch. 52. 1820 567

Chapter.LII. - *An Act in addition to the several acts for the establishment and regulation of the Treasury, War, and Navy Departments.*

* * *

SIXTEENTH CONGRESS. Sess. I. Ch. 52. 1820 568

SEC. 6. *And be it further enacted,* That no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfilment; and excepting also, contracts for the subsistence and clothing of the army or navy, and contracts by the quartermaster's department, which may be made by the Secretaries of those departments.

FORTY-FIRST CONGRESS. Sess. II. Ch. 245. 246, 247, 251. 1870. 230

CHAP. CCLI. *An Act making Appropriations for the legislative, executive, and judicial Expenses of the Government for the Year ending the thirtieth of June, eighteen hundred and seventy-one.*

***

FORTY-FIRST CONGRESS. Sess. II. Ch. 251, 252. 1870. 251

SEC. 7. *And be it further enacted,* That it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.

FIFTY-EIGHTH CONGRESS. Sess. III. Chs. 1483, 1484. 1905. 1214

CHAP 1484. -- An Act Making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and five, and for prior years, and for other purposes.

***

FIFTY-EIGHTH CONGRESS. Sess. III. Ch. 1484. 1905. 1257

SEC. 4. That section thirty-six hundred and seventy-nine of the Revised Statutes of the United States is hereby amended to read as follows:

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any Department or officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made for fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the

amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent undue expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year: and all such apportionments shall be adhered to except when waived or modified in specific cases by the written order of the head of the Executive Department or other Government establishment having control of the expenditure or other Government establishment having control of the expenditure, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and all such waivers or modifications, together with the reasons therefor, shall be communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month."

81ST CONG., 2D SESS.-CH. 896- 765
SEPT. 6, 1950

SEC. 1211. Section 3679 of the Revised Statutes, as amended (31 U.S.C. 665), is hereby further amended to read as follows:

"SEC. 3679. (a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an

obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

"(b) No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

"(c) (1) Except as otherwise provided in this section, all appropriations or funds available for obligation for a definite period of time shall be so apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and all appropriations or funds not limited to a definite period of time, and all authorizations to create obligations by contract in advance of appropriations, shall be so apportioned as to achieve the most effective and economical use thereof. As used hereafter in this section, the term "appropriation" means appropriations, funds, and authorizations to create obligations by contract in advance of appropriations.

"(2) In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available. Whenever it is determined by an officer designated in subsection (d) of this

section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the purposes of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations.

"(3) Any appropriation subject to apportionment shall be distributed by months, calendar quarters, operating seasons, or other time periods, or by activities, functions, projects, or objects, or by a combination thereof, as may be deemed appropriate by the officers designated in subsection (d) of this section to make apportionments and reapportionments. Except as otherwise specified by the officer making the apportionment, amounts so apportioned shall remain available for obligation, in accordance with the terms of the appropriation, on a cumulative basis unless reapportioned.

"(4) Apportionments shall be reviewed at least four times each year by the officers designated in subsection (d) of this section to make apportionments and reapportionments, and such reapportionments made or such reserves established, modified, or released as may be necessary to further the effective use of the appropriation concerned, in accordance with the purposes stated in paragraph (1) of this subsection.

"(d) (1) Any appropriation available to the legislative branch, the judiciary, or the District of Columbia, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the officer having administrative control of such appropriation. Each such appropriation shall be apportioned not later than thirty days before the beginning of the fiscal year for which the appropriation is available, or not more than thirty days after approval of the Act by which the appropriation is made available, whichever is later.

"(2) Any appropriation available to an agency, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the Director of the Bureau of the Budget. The head of each agency to which any such appropriation is available shall submit to the Bureau of the Budget information, in such form and manner and at such time or times as the Director may prescribe, as may be required for the apportionment of such appropriation. Such information shall be submitted not later than forty days before the beginning of any fiscal year for which the appropriation is available, or not more than fifteen days after approval of the Act by which such appropriation is made available, whichever is later. The Director of the Bureau of the Budget shall apportion each such appropriation and shall notify the agency concerned of his action not later than twenty days before the beginning of the fiscal year for which the appropriation is available, or not more than thirty days after the approval of the Act by which such appropriation is made available, whichever is later. When used in this section, the term 'agency' means any executive department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the Government, including any corporation wholly or party owned by the United States which is an instrumentality of the United States. Nothing in this subsection shall be so construed as to interfere with the initiation, operation, and administration of agricultural price support programs and no funds (other than fund for administrative expenses) available for price support, surplus removal, and available under Section 32 of the Act of August 24, 1935, as amended (7 U.S. C. 612 (c)), with respect to agricultural commodities shall be subject to apportionment pursuant to this section. The provisions of this section shall not apply to any corporation which obtains funds for making

loans, other than paid in capital funds, without legal liability on the part of the United States.

"(e) (1) No apportionment or reapportionment which, in the judgment of the officer making such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate shall be made except upon a determination by such officer that such action is required because of (A) any laws enacted subsequent to the transmission to the Congress of the estimates for an appropriation which require expenditures beyond administrative control; or (B) emergencies involving the safety of human life, the protection of property, or the immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payment of, or contributions toward, sums which are required to be paid to individuals either in specific amounts fixed by law or in accordance with formulae prescribed by law.

"(2) In each case of an apportionment or a reapportionment which, in the judgment of the officer making such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate, such officer shall immediately submit a detailed report of the facts of the case to the Congress. In transmitting any deficiency or supplemental estimates required on account of any such apportionment or reapportionment, reference shall be made to such report.

"(f) (1) The officers designated in subsection (d) of this section to make apportionments and reapportionments may exempt from apportionments trust fund and working funds expenditures from which have no significant effect on the financial operations of the Government, working capital and revolving funds established for intragovernmental operations,

receipts from industrial and power operations available under law and any appropriation made specifically for--

"(1) interest on, or retirement of, the public debt;

"(2) payment of claims, judgments, refunds, and drawbacks;

"(3) any item determined by the President to be of a confidential nature;

"(4) payment under private relief Acts or other laws requiring payments to designated payees in the total amount of such appropriation;

"(5) grants to the States under title I, IV, or X of the Social Security Act, or under any other public assistance title in such Act.

"(2) The provisions of subsection (c) of this section shall not apply to appropriations to the Senate or House of Representatives or to any Member, committee, Office (including the office of the Architect of the Capitol), officer, or employee thereof.

"(g) Any appropriation which is apportioned or reapportioned pursuant to this section may be divided and subdivided administratively within the limits of such apportionments or reapportionments. The officer having administrative control of any such appropriation available to the legislative branch, the judiciary, or the District of Columbia, and the head of each agency, subject to the approval of the Director of the Bureau of the Budget, shall prescribe, by regulation, a system of administrative control (not inconsistent with any accounting procedures prescribed by or pursuant to law) which shall be designed to (A) restrict

obligations or expenditures against each appropriation to the amount of apportionments or reapportionments made for each such appropriation, and (B) enable such officer or agency head to fix responsibility for the creation of any obligation or the making of any expenditure in excess of an apportionment or reapportionment.

"(h) No officer or employee of the United States shall authorize or create any obligation or make any expenditure (A) in excess of an apportionment or reapportionment, or (B) in excess of the amount permitted by regulations prescribed pursuant to subsection (g) of this section.

"(i) (1) In addition to any penalty or liability under other law, any officer or employee of the United States who shall violate subsection (a), (b), or (h) of this section shall be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; and any officer or employee of the United States who shall knowingly and willfully violate subsection (a), (b), of (h) of this section shall, upon conviction, be fined not more than $5,000 or imprisoned for not more than two years, or both.

"(2) In the case of a violation of subsection (a), (b), or (h) of this section by an officer or employee of an agency, or of the District of Columbia, the head of the agency concerned or the Commissioners of the District of Columbia, shall immediately report to the President, through the Director of the Bureau of the Budget, and to the Congress all pertinent facts together with a statement of the action taken thereon."

TITLE 31 -- MONEY AND FINANCE § 1341

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not --

(A) make or authorize an expenditure or obligation exceeding an an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contact or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an

appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

TITLE 31 -- MONEY AND FINANCE § 1511

§ 1511. Definition and application

(a) In this subchapter, "appropriations" means--

(1) appropriated amounts;

(2) funds; and

(3) authority to make obligations by contract before appropriations.

(b) This subchapter does not apply to--

(a) amounts (except amounts for administrative expenses) available--

(A) for price support and surplus removal of agricultural commodities; and

(B) under section 32 of the Act of August 24, 1935 (7 U.S.C. 612c);

(2) a corporation getting amounts to make loans (except paid in capital amounts) without legal liability on the part of the United States Government; and

(3) the Senate, the House of Representatives, a committee of Congress, a member, officer, employee, or office of either House of Congress, or the Office of the

Architect of the Capitol or an officer or employee of that Office.

TITLE 31 -- MONEY AND FINANCE

§ 1512. Apportionment and reserves

(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.

(b)(1) An appropriation subject to apportionment is apportioned by--

(A) months, calendar quarters, operating seasons, or other time periods;

(B) activities, functions, projects, or objects;

(C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.

(2) The official designated in section 1513 of this title to make apportionments shall apportion an appropriation under paragraph (1) of this subsection as the official considers appropriate. Except as specified by the official, an amount apportioned is available for obligation under the terms of the appropriation on a cumulative basis unless reapportioned.

(c)(1) In apportioning or reapportioning an appropriation, a reserve may be established only--

(A) to provide for contingencies;

(B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or

(C) as specifically provided by law.

(2) A reserve established under this subsection may be changed as necessary to carry out the scope and objectives of the appropriation concerned. When an official designated in section 1513 of this title to make apportionments decides that an amount reserved will not be required to carry out the objectives and scope of the appropriation concerned, the official shall recommend the rescission of the amount in the way provided in chapter 11 of this title for appropriation requests. Reserves established under this section shall be reported to Congress a provided in the Impoundment Control Act of 1974 (2 U.S.C. 681 et seq.).

(d) An apportionment or a reapportionment shall be reviewed at least 4 times a year by the official designated in section 1513 of this title to make apportionments.

§ 1513. Officials controlling apportionments

(a) The official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government that is required to be apportioned under section 1512 of this title shall apportion the appropriation in writing. An appropriation shall be apportioned not later than the later of the following:

(1) 30 days before the beginning of the fiscal year for which the appropriation is available; or

(2) 30 days after the date of enactment of the law by which the appropriation is made available.

(b)(1) The President shall apportion in writing an appropriation available to an executive agency (except the Commission) that is required to be apportioned under section 1512 of this title. The head of each executive agency to which the appropriation is available shall submit to the President information required for the apportionment in the form and the way and at the time specified by the President. The information shall be submitted not later than the later of the following:

(A) 40 days before the beginning of the fiscal year for which the appropriation is available; or

(B) 15 days after the date of enactment of the law by which the appropriation is made available.

(2) The President shall notify the head of the executive agency of the action taken in apportioning the appropriation under paragraph (1) of this subsection not later than the later of the following:

(A) 20 days before the beginning of the fiscal year for which the appropriation is available; or

(B) 30 days after the date of enactment of the law by which the appropriation is made available.

(c) By the first day of each fiscal year, the head of each executive department of the United States Government shall apportion among the major organizational units of the

department the maximum amount to be expended by each unit during the fiscal year out of each contingent fund appropriated for the entire year for the department. Each amount may be changed during the fiscal year only by written direction of the head of the department. The direction shall state the reasons for the change.

(d) An appropriation apportioned under this subchapter may be divided and subdivided administratively within the limits of the apportionment.

(e) This section does not affect the initiation and operation of agricultural price support programs.

§ 1514. Administrative division of apportionments

(a) The official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government, and, subject to the approval of the President, the head of each executive agency (except the Commission) shall prescribe by regulation a system of administrative control not inconsistent with accounting procedures prescribed under law. The system shall be designed to--

(1) restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of the appropriation; and

(2) enable the official or the head of the executive agency to fix responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.

(b) To have a simplified system for administratively dividing appropriations, the head of each executive agency (except the Commission) shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative division for each appropriation affecting the unit.

§ 1515. Authorized apportionments necessitating deficiency or supplemental appropriations

(a) An appropriation required to be apportioned under section 1512 of this title may be apportioned on a basis that indicates the need for a deficiency or supplemental appropriation to the extent necessary to permit payment of such pay increases a may be granted pursuant to law to civilian officers and employees (including prevailing rate employees whose pay is fixed and adjusted under subchapter IV of chapter 53 of title 5) and to retired and active military personnel.

(b)(1) Except a provided in subsection (a) of this section, an official may make, and the head of an executive agency may request, an apportionment under section 1512 of this title that would indicate a necessity for a deficiency or supplemental appropriation only when the official or agency head decides that the action is required because of--

(A) a law enacted after submission to Congress of the estimates for an appropriation that requires an expenditure beyond administrative control; or

(B) an emergency involving the safety of human life, the protection of property, or the immediately welfare of individuals when an appropriation that would allow the United States Government to pay, or contribute to, amounts

required to be paid to individuals in specific amounts fixed by law or under formulas prescribed by law, is insufficient.

(2) If an official making an apportionment decides that an apportionment would indicate a necessity for a deficiency or supplemental appropriation, the official shall submit immediately a detailed report of the facts to Congress. The report shall be referred to in submitting a proposed deficiency or supplemental appropriation.

§ 1516. Exemptions

An official designated in section 1513 of this title to make apportionments may exempt from apportionment--

(1) a trust fund or working fund if an expenditure from the fund has no significant effect on the financial operations of the United States Government;

(2) a working capital fund or a revolving fund established for intragovernmental operations;

(3) receipts from industrial and power operations available under law; and

(4) appropriations made specifically for--

(A) interest on, or retirement of, the public debt;

(B) payment of claims, judgments, refunds, and drawbacks;

(C) items the President decides are of a confidential nature;

(D) payment under a law requiring payment of the total amount of the appropriation to a designated payee; and

(E) grants to the States under the Social Security Act (42 U.S.C. 301 et seq.).

§ 1517. Prohibited obligations and expenditures

(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding--

(1) an apportionment; or

(2) the amount permitted by regulations prescribed under section 1514(a) of this title.

(b) If an officer or employee of an executive agency or of the District of Columbia government violates subsection (a) of this section, the head of the executive agency or the Mayor of the District of Columbia, as the case may be, shall report immediately to the President and Congress all relevant facts and a statement of actions taken.

§ 1518. Adverse personnel actions

An officer or employee of the United States Government or of the District of Columbia government violating section 1517(a) of this title shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.

§ 1519. Criminal penalty

An officer or employee of the United States Government or of the District of Columbia government knowlingly and willfully violating section 1517(a) of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both.

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Department of Defense

DIRECTIVE

May 7, 1984
NUMBER 7200.1

ASD(C)

SUBJECT: Administrative Control of Appropriations

References:
(a) DoD Directive 7200.1, "Administrative Control of Appropriations," November 15, 1978 (hereby canceled)
(b) Title 31, United States Code, Subchapter III of Chapter 13 and Subchapter II of Chapter 15 (except at enclosure 1)
(c) Office of Management and Budget (OMB) Circular A-34, "Instructions on Budget Execution," July 1976 (excerpt at enclosure 2)
(d) through (h), see enclosure 3

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a) to update under references (b) and (c) the statutory references applicable to administrative control of appropriations, provides policy, and assigns responsibilities.

B. APPLICABILITY AND SCOPE

This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Defense Agencies and the Uniformed Services University of the Health Sciences (hereafter referred to collectively as "DoD Components") and includes all civil and military functions under the direct supervision of a DoD Component.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 4.

D. POLICY

It is DoD policy that each DoD Component shall establish and maintain adequate systems of accounting for and positive control of appropriations and other funds made available. These accounting and fund control systems shall provide a capability for an official to be assured of the availability of funds before incurring an obligation. The systems also shall be on an accrual basis and provide information on financial transactions and on the use of funds as needed for management purposes.

1. The systems shall provide the necessary information for establishing responsibility if a violation of subsection 1341(a) or 1517(a) or section 1342 of 31 U.S.C. (reference (b)) occurs and for the reporting of such a violation as prescribed here.

2. The accounting systems of the Department of Defense shall be consistent with the standards and principles

prescribed by the Comptroller General of the United States. Moreover, DoD Components shall obtain approval for their accounting systems from the Comptroller General of the United States.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Comptroller) shall:

a. Administer the policies prescribed here for the administrative control of funds.

b. Administer, further subdivide, and use funds apportioned, reapportioned, or otherwise made available to the Secretary of Defense, to the Office of the Secretary of Defense, o r to the Department of Defense.

c. Review and approve all reports of violations prepared by DoD Components, and prepare submission of such reports for the Secretary of Defense to the President through the Director of OMB, and to the Congress.

2. The Secretaries of the Military Departments, the Directors, Defense Agencies, the Director, Washington Headquarters Services and the President of the Uniformed Services University of the Health Sciences shall:

a. Ensure compliance with this Directive.

b. Investigate any apparent violations of subsection 1341(a) or 1517(a) or section 1342 of 31 U.S.C. (reference (b)) as implemented by this Directive.

c. Prepare reports of violations of subsection 1341(a) or 1517(a) or section 1342 of reference (b) in accordance with the procedures at enclosure 5.

d. Submit requests for apportionment or reapportionment of appropriations or other funds that are required to be apportioned.

e. Issue, in writing, administrative subdivisions of funds.

f. Review and approve justifications and control procedures for generally managed allotments.

3. Heads of DoD Components shall comply with the provisions of this Directive.

F. PROCEDURES

Detailed procedures are prescribed in enclosure 5.

PROCEDURES

A. GOVERNING REGULATION

This Directive is the governing regulation for the administrative control of funds for all DoD Components. Its provisions were approved by the Director of OMB under subsection 1514(a) of 31 U.S.C. (reference (b)). It shall be reproduced in its entirety, without change, in the regulatory issuances of each DoD Component. supplemental guidance, including policy for control of nonapportioned appropriations, is contained in DoD 7220.9-M (reference (d)). Related DoD Component procedural issuances shall be fully consistent with this Directive.

B. DUTIES OF DoD OFFICIALS, INCLUDING COMMANDERS AND SUPERVISORS

1. The DoD officials to whom apportionments or administrative subdivisions of apportionments are issued shall:

a. Use funds only for the purpose prescribed and not exceed funding authority, including any limitations, within or on that authority.

b. Record properly all obligations and ensure that all recorded obligations are valid.

2. Commanders and supervisors shall:

a. Not accept voluntary service for the United States, and no employment of personal service over that authorized by law, except in cases of emergency involving the safety of human life or the protections of property.

b. Issue the required delegations of authority.

c. Ensure that all personnel involved in administrative control and use of funds are fully responsible and comply with this Directive.

C. SYSTEMS FOR ADMINISTRATIVE CONTROL OF FUNDS

1. Systems for administrative control of funds shall be designed so that administrative subdivisions of funds are placed at the highest practical organizational level consistent with effective and efficient management. For example, a single allotment for an appropriation or other fund usually provides in appropriate basis for control without further allotting the funds by program elements, object classes, or other subdivisions. The use of limitations on the funding documents shall be limited to those necessary to comply with statutory provisions of the appropriate authorization or appropriation act, or to meet the needs of unusual or special situations.

2. A system for administrative control of funds, by itself, may not provide data for reviewing the efficiency with which funds are used. When a need exists for accumulating data below the allotment or suballotment level, a reporting requirement shall be established, but shall be distinguishable from administrative subdivisions of funds.

E. DELEGATIONS OF AUTHORITY OR FUNCTIONS

All delegations or redelegations of authority or functions under this Directive shall be made in writing. No delegation or redelegation of authority or functions shall be exercised in any manner that will limit the capabilities of the Secretaries of the Military Departments, and Directors of Defense Agencies, or designated officials of the Office of the Secretary of Defense to exercise the control necessary to discharge properly their responsibilities.

F. BUDGETARY POLICY

Budgetary policy is provided by DoD 7110.1-M (reference (e)). It provides policy guidance on appropriation requests, supplemental appropriation estimates, appropriation transfer authority, apportionment guidance, reprogramming actions, rescissions, and deferrals.

G. APPORTIONMENTS

1. When appropriations or other funds are required to be apportioned to a DoD Component under law, a request for the apportionment or reapportionment shall be prepared and submitted through the ASD(C) to the Director of OMB. The request shall be in such form and at such time as the ASD(C) may prescribe to conform with the requirements of the Director of OMB (see reference (e)).

2. Obligations during any apportionment period must not exceed the amount of the apportionment available for that period or of any administrative subdivisions of the apportionment.

H. ALLOCATIONS

1. The ASD(C), or designee, shall make allocations of apportioned amounts, in writing, to the heads of DoD Components. The Secretary of a Military Department, or designee, shall make further allocations of apportioned amounts, in writing, to the heads of operating agencies. The original signed document of an authenticated copy bearing an original signature shall be forwarded to the recipient of the allocation. Amounts allocated may be suballocated to major subordinate operating commands. This does not preclude the use of an automated system to communicate and record fund subdivisions as long as a confirmation copy bearing an original signature is provided to the recipient within a reasonable time, usually 1 month.

2. Allocations shall not exceed the amount available for use for each apportionment period.

3. The amount of any appropriation that is apportioned or reapportioned and allocated may include estimated reimbursements, transfers, or other items of anticipated receipts. If it is determined that such items will not be realized, such as earned and collected reimbursements, appropriate adjustments of amounts allocated shall be made promptly.

4. Allocations, suballocations, or parts of them, that are not required to be subdivided further may be treated and recorded as allotments.

5. DoD Components shall not authorized or create an obligation, or make a disbursement against apportioned anticipated transfer authorizations to be received. Such actions must be delayed until the accomplished Standard

Form (SF) 1151, "Nonexpenditure Transfer Authorization," is received.

I. ALLOTMENTS

1. The recipients of allocations and suballocations, or their designees, shall make allotments in specific amounts to the heads of installations or organizational units of DoD Components, as required. The total of the amounts allotted shall not exceed the amount of the allocation available for each period.

2. The recipients of allotments may make suballotments to the heads of other organizational units, including those of other DoD Components, as required. The total of the amounts suballotted shall not exceed the amount of the allotment available for use for each period.

3. Allotments and suballotments shall be made in writing and the recipient's copy either shall be signed by the fund-issuing authority or be an authenticated copy bearing an authorized original signature. The document shall contain at least the following basic information:

a. The name or title of the allottee.

b. The amount of the allotment and the period of availability.

c. Legal restrictions on the obligation and disbursement of the allotted funds.

d. The amount of anticipated reimbursements shall be specified to the organizational level responsible for receiving the reimbursable orders.

4. In some cases it may not be feasible to provide a formal allotment or suballotment document before incurring obligations. Under such emergency conditions, it may be necessary to use expedited means of communication pending formal confirmation. In such cases, both the allotter and allottee shall document the funding transaction showing the action taken, the date, the amount involved, the authorizing official, and the method of communication. The recipient is responsible for following up if formal documentation is not received within a reasonable time, normally not more than 1 month. An automated system may be used to communicate and record fund subdivisions. Under an automated system, the allotter, normally within 1 month, shall follow-up the automated notification with a confirmation copy bearing an original signature.

5. The head of an operating agency who has the specific written approval of the DoD Component head, may establish centrally-managed allotments. These allotments shall be established only when it is impractical to administer decentralized allotments under normal operating procedures. More specific guidance on the requirements for establishing centrally managed allotments are provided in DoD 7220.9-M (reference (d)). Before approval, a specific written determination shall be made that adequate controls have been established to avoid overobligating or overexpending a centrally-managed allotment.

a. The amount of the centrally-managed allotment shall be within the amount and terms of the allocation.

b. Requests for the establishment of a centrally-managed allotment must justify fully the need,

delineate possible alternatives, and demonstrate clearly why the centrally-managed allotment method is the only practical administrative procedure.

c. The official who establishes or continues the use of a centrally-managed allotment shall be held responsible, to the extent prescribed by law, directive, and regulation, for ensuring that obligations are not incurred, or expenditures made, beyond the amount available under each centrally-managed allotment.

d. The establishing or continuing official is responsible for the administration of each centrally-managed allotment and shall prescribe an adequate system of control, financial and nonfinancial, including (1) designation, by name or position, or specific individuals authorized to incur obligations or make expenditures against each centrally-managed allotment, and (2) establishing suitable limitations on the numbers, quantities or volume for which obligations may be incurred or expenditures made. The system shall provide for accounting and reporting at least monthly and shall ensure timely notice to prevent the centrally-managed allotment from being overobligated or overexpended by taking necessary management action, which may include:

(1) Increasing the amount of the centrally-managed allotment;

(2) Terminating the centrally-managed allotment; or

(3) Taking other necessary management actions to prevent an overobligation or overexpenditure.

e. Each centrally-managed allotment shall be reviewed annually to determine whether its operation should be continued. This determination shall be made by the head of the DoD Component concerned, or designee. The annual review shall include an evaluation by an internal audit group of the adequacy of the control procedures established to prevent violations of subsection 1341(a) or 1517(a), or both, of 31 U.S.C. (reference (b)) and a recommendation whether continuation of the centrally-managed allotment is justified.

J. REIMBURSABLE ORDERS

1. Reimbursable orders applicable to appropriations or other funds subject to apportionment shall be administered by, or on behalf of, the DoD Components concerned.

2. Apportioned anticipated reimbursements shall not be allotted unless there is reasonable assurance that orders will be received. Even though apportioned and allotted, these estimates shall not be considered budgetary resources available for obligation unless (a) valid orders, including written agreements, have been received; (b) goods and services have been furnished and there is entitlement to payment; or (c) in the case of orders from the public, advance payment has been made. The only exception to this rule is in the case of certain DoD stock funds in which section 2210(b) of 10 U.S.C. (reference (f)) gives the Department of Defense, with OMB approval, authority to incur obligations against anticipated reimbursements.

3. Under certain circumstances, and with the written approval of OMB, the immediate and automatic apportionment of amounts of reimbursable orders received and accepted may be authorized. (See paragraph 412.6 of DoD 7110.1-M, reference (e).)

4. Reimbursable orders received from state or local governments, foreign governments, corporations, or individuals are subject to special controls. These orders, except Foreign Military Sales (FMS) orders, shall be recognized as reimbursable orders received only to the extent that cash has been received and deposited with the Treasury. FMS orders may be recognized as contract authority in the FMS Trust Fund and, in turn, released to performing DoD Components although cash has not been received. However, disbursement controls shall be established to ensure that disbursements are not made until the cash is actually deposited in the FMS Trust Fund and transferred to the appropriation account, or an expenditure authorization has been received from the holder of the FMS Trust Fund.

5. Reimbursable orders that are financed by appropriated or revolving funds of federal agencies provide expenditure as well as obligational authority.

6. Officials responsible for incurring obligations and making expenditures shall be particularly cognizant of the reimbursable authority received. Controls shall be established to avoid obligating or expending over the amount of appropriated funds, plus the reimbursements that ultimately will be earned and collected.

K. OBLIGATIONS AND EXPENDITURES

1. In certain limited circumstances, obligations may be incurred exceeding available funds under section 3732 of the Revised Statutes as amended (41 U.S.C. 11, reference (g)). This statute is implemented by DoD Directive 7220.8 (reference (h)).

2. Except as provided by subsection K.1., above, no DoD official shall authorize (such as, commit) or create any obligation, or make any expenditure under any appropriation or fund exceeding the following:

a. The available amount of such appropriation or fund.

b. The available amount of an apportionment or reapportionment or administrative subdivision thereof.

c. Any statutory restriction imposed on the use of such appropriation or other fund.

d. Any limitation imposed by an authorized official that is intended to provide a limitation on the obligation of apportioned funds.

3. Once incurred, all obligations shall be recorded accurately and promptly, even if recordation results in an apparent overobligation. A violation is not avoided by the failure to record a valid obligation. For the prerequisites for the recording and reporting of obligations, consult DoD 7220.9-M (reference (d)).

4. Adjustments in obligations often consist of recording obligations that existed in a prior period that may or may not have been known during that period. If this causes the total obligations for the prior period to exceed the amount that was available for obligation in that prior period, a violation of subsection 1341(a) or 1517(a), or both, of 31 U.S.C. (reference (b)) has occurred.

L. CONTROL OF APPORTIONED REVOLVING FUNDS

1. Obligations or expenditures of all revolving funds shall be controlled by, or on behalf of, each DoD Component head. Apportioned revolving funds shall be controlled administratively under applicable provisions of this Directive. For those revolving funds or portions thereof subject to apportionment:

a. Records shall be maintained for the proper control of apportionments received so reports on their status can be furnished.

b. Enough notice must be provided before the apportionment is going to be exceeded to permit obtaining an increase in the apportionment, or to permit the institution of controls to prevent the overobligation or overexpenditure of the apportionment.

2. Cash balances shall be maintained in working capital funds only in amounts necessary at any time to make cash disbursements. This requirement applies whether the working capital fund is apportioned or not.

M. RECORDS

DoD Components and any other organizational unit assigned functions under this Directive shall maintain accounting records that provide full disclosure of the financial operations and resource utilization applicable at each successive organizational level. These records shall show the current and continuing available balances at each required stage of the funding operation. The records shall constitute an integral part of the official accounting records of the DoD Component to the extent required to be maintained at each successive organization level. Financial

reports either shall be taken from the accounting records or be reconcilable to those records.

DEPARTMENT OF DEFENSE

ACCOUNTING MANUAL

OCTOBER 1983

OFFICE OF ASSISTANT SECRETARY OF DEFENSE (COMPTROLLER)

REPRODUCED BY
U.S. DEPARTMENT OF COMMERCE
NATIONAL TECHNICAL
INFORMATION SERVICE
SPRINGFIELD, VA 22161

4. Criteria for Applying DoD Directive 7200.1. It is important that all DoD Components use the uniform criteria set forth below in applying DoD Directive 7200.1.

a. Violations of DoD Directive 7200.1. For apportioned funds, a violation of DoD Directive 72001. is a violation of 31 U.S.C. 1517 (reference (v)). Since DoD Directive 7200.1 was issued pursuant to 31 U.S.C. 1517, it has the force and effect of law. Section 1517 provides that:

"(a) An officer or employee of the United States government or of the district of Columbia government may not make or authorize and expenditure or obligation exceeding --

(1) an apportionment; or

(2) the amount permitted by regulations prescribed under section 1514(a) of this title.

(b) If an officer or employee of an executive agency or the District of Columbia government violates subsection (a) of this section, the head of the executive agency or the Mayor of the District of Columbia, as the case may be, shall report immediately to the President and Congress all relevant facts and a statement of actions taken."

b. Effect of Violating DoD Directive 7200.1. Authorizing or creating an obligation, or making an expenditure in excess of the amount permitted by DoD directive 7200.1, or violating any of its provisions is as much, and as serious a violation of the law as authorizing or creating obligation or making an expenditure in excess of an appropriation, apportionment, or reapportionment. Moreover, if the violation is one that warrants administrative discipline, no distinction shall be made in applying the DoD Directive 7200.1 (or violation of any of its provisions) and an overobligation of an apportionment or reapportionment. In this connection, the application of administrative discipline is not dependent upon a knowing or willful offense. Appropriate administrative discipline shall be taken in any case for which the circumstances indicated that it is warranted. More severe penalties, however, are prescribed for violations committed "knowingly" or "willfully."

c. Errors in Recording. Errors in posting to accounting records are for violations as such. However, such errors may cause an actual overallocation, overallotment, overobligation, or thereby resulting in a violation of 31 U.S.C. 1517(a). For example, if an allotment advice representing an increase to an existing allotment is erroneously posted as an increase to another allotment account, and obligations are subsequently incurred in that account in excess of the correct balance, such obligations are in violation of 31 U.S.C. 1517(a), and the person who made the error is responsible for the violation. On the other hand, any apparent overobligations that may have been recorded in the proper allotment account, but which are eliminated upon correction ofthe error are not violations of 31 U.S.C. 1517(a)

d. Withdrawal of Funds in Excess of Available Balances. There have been instances when funds have been withdrawn in excess of available

PART A: GENERAL

073000 DEFINITION

Budget execution is that phase of the budget cycle which encompasses all the actions required to accomplish effectively, efficiently, and economically the programs for which funds were requested and approved by competent authority. The budget execution phase overlaps the formulation and review phases and continues throughout the period of availability of the appropriations for obligation or expenditure. Effective budget execution requires procedures for control and evaluation which will ensure compliance with regulations and limitations established by the Congress, the General Accounting Office the Treasury Department, the Office of Management and Budget (OMB) and the Secretary of Defense, as well as by all echelons of responsibility and command within the Department of the Navy.

073001 RESPONSIBILITIES

1. OFFICE OF MANAGEMENT AND BUDGET. The Director of the Office of management and Budget is required by 31 U.S. Code 1512 to apportion appropriations or funds so "as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations. . . " The apportionment may be in terms of time periods or "by activities, functions, projects or objects," as deemed appropriate.

2. SECRETARY OF DEFENSE. Title IV of the National Security Act amendments of 1949 (10 U.S. Code 5061) requires that the Secretary of Defense control the rates of obligations to prevent overdrafts and deficiencies. Based on the provisions of 31 U.S. Code 1512, the current issuance of DODDIR 7200.1, "Administrative Control of

Appropriations" (see Volume 2, Appendix A), provides regulations for the restriction of obligations and expenditures. Among other things, the directive requires that apportionment of reapportionment requests be submitted through the Office of the Assistant Secretary of Defense (Comptroller review and decisions.

3. DEPARTMENT OF THE NAVY. The same DODDIR 7200.1 on the administrative control of appropriations charges the secretaries of the Military Department, or other designated officials with responsibility for preparation and submission of apportionment requests for appropriated and revolving funds as prescribed by the Director of the Office of Management and Budget and the Assistant Secretary of Defense (Comptroller) and for allocation the apportioned funds in such manner as not be in excess of the available amounts, maintaining appropriate accounting records, and reporting on the basis of those records. The Secretary of the Navy has assigned the responsibility for allocation of funds and administration of apportionments to the Comptroller of the Navy (Navy Regulations, 1973, par. 0203.4). The Comptroller allocates funds to the Chief of Naval Operations, to the Commandant of the Marine Corps, or to other responsible officials within the Department of the Navy, each of whom is required to exercise effective control of financial operations within the procedures and systems established by the Comptroller ????? Comptroller also has the responsibility, ????? the Director, Office of Budget and Reports, for continuous review of rates of obligation and expenditure of appropriated funds, including the consideration and review of reprogramming proposals, and for the submission of reports to the Secretary of Defense, the Office of Management and Budget, and the Treasury Department regarding the status of appropriations and apportionments.

073002 PROCEDURES FOR ESTABLISHING AVAILABILITY

1. PRIOR TO APPROPRIATION ENACTMENT

a. General. Provisions of the Congressional Budget and Impoundment Control Act of 1974 (P.L. 94-344) require the Congress to pass the annual Department of Defense Appropriation Act by 1 October. In the event the Act has not been passed by this time, the Congress provides funding authority through a Continuing Resolution Authority (CRA) making interim appropriations available. The intent of the CRA is to provide funds to maintain operations at a rate necessary for the orderly continuation of activities until regular appropriations are enacted. The CRA language normally provides for the amounts the Congress deems necessary to continue operations in support of projects or activities until Appropriation Bills can be enacted. Based on the CRA and the Department of the Navy request, the Treasury Department prepares temporary appropriation warrants which, after being countersigned by the General Accounting Office, are forwarded to the Department of the Navy as certification that the specified amounts are available for commitment, obligation , and expenditure against the direct budget programs. Specific rates of obligation are prescribed by the Secretary of Defense as required by 10 U.S. Code 2204. Customarily, an integral part of the obligation rates so prescribed is a listing of approved items or programs for which obligational authority is released. The listing also reflects items or programs for which obligational authority is restricted or prohibited. The Comptroller allocates funds at a level of availability which, at the appropriation total, conforms to the most restrictive amount established thus far in the allocation process by either temporary warrants, rates of obligation, or approved restricted lists. Carry-over

apportionments of multiple-year and continuing appropriations also are continued by the Secretary of Defense for obligations at a rate necessary to support approved programs for which apportionments were made in the preceding fiscal year. Heads of appropriate responsible components are authorized to suballocate funds, issue allotments and such other funding documents as necessary within funding grants, limitations, and policies expressed by the Comptroller, See par. 073201 for procedures applicable to continuation of financial operations under authority of a CRA.

b Congressional Prerogatives. The House Appropriations Committee has stated its philosophy underlying the apparent broad grant of funding authority under a CRA in party:

> "Without laying down any hard and fast and short of encumbering administrative processes with detailed fiscal controls, the Committee nonetheless thinks that to the extent reasonably possible, departments and agencies should avoid the obligations of funds for specific budget line items or program allocations, on which congressional committees have expressed strong criticism, at rates which unduly impinge upon discretionary decisions otherwise available to the Congress. Otherwise, it may become necessary to curtail the interim flexibility now provided in continuing resolutions - a procedure which over the years has generally served its purpose rather satisfactorily."

Operating officials must take administrative actions in consonance with limitations on rates of obligation while operating under a CRA.

*2 PURSUANT TO APPROPRIATION ENACTMENTS. On the basis of the enacted Department of the Navy appropriations, the Treasury Department prepares appropriation warrants which, after being countersigned by the General counting Office, are forwarded to the Department of the Navy as certification that the spec. amounts are available for obligation and expenditure. Fund availability is established through compliance with procedures for submission, review, and Office of Secretary of Defense (OSD)/Office of Management and Budget (OMB) approval of apportionments and/or financial plans. In conjunction with the apportionment procedure, the Office of the Assistant Secretary of Defense (Comptroller) establishes the authorized level of obligation and expenditure for each appropriation, as well as any controls or limitations required below the appropriation level, as a means of requiring compliance with the terms of approved programs and budgets. In passing obligational authority (as an allocation or as a limitation within operating budget authority) to other echelons of command, the Comptroller creates administrative subdivisions of appropriated funds with clearly defined responsibility for 31 U.S. Code 1517 violations, i.e., for the creation of any obligation or making of any expenditure in excess of an apportionment or reapportionment, or of an amount specified in an administration subdivision thereof. The process of distributing financial authority is continued through the chain of command in the form of suballocations, allotments, operating budgets, or operating targets. Allotments, as well as the specified obligational authority within operating budgets, constitute administrative subdivisions of appropriated funds, subject to the sanctions

of the Anti-Deficiency Act (31 U.S. Code 1518 and 1519) for the holders of allotments or operating budgets. Operating targets (e.g., those established for individual ships by type commanders) are administrative limitations of funds for which the legal responsibility is retained by the grantor.

3. EMERGENCY CIRCUMSTANCES

a. Section 3732 Authority. In addition to appropriated funds, the Military Departments may be authorized by the Secretary of Defense under the provisions of Sec. 3732, R.S. (41 U.S. Code 11) to incur obligations in excess of available appropriations in procuring or furnishing clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospitals supplies not to exceed the necessities of the current fiscal year. OSD limits the use of Sec. 3732 R.S. authority to emergency circumstances requiring immediate action that cannot be delayed due to the nonavailablility of sufficient fund. The responsible officer or official who exercises this authority to incur over obligation, over-commitment, or over expenditure of funds is required to report immediately to the next higher echelon in accordance with the procedures in par. 032010-4c. These reports are handled expeditiously through the chain of command to permit prompt submission to OSD. Subsequently, if such over obligations cannot be covered through reprograming of funds, it is necessary to request an appropriation from Congress for the required liquidations.

*b General Provisions. For several years, the General Provisions of the Department of Defense Appropriation Acts have included authority for the President to exempt appropriations, funds, and contract authorizations, available for military functions under DOD, from the provisions of 31 U.S. Code 1517, action to be necessary in

the interests of national defense. In this connection the General Provisions have stated that upon the determination by the President that such action is necessary, the Secretary of Defense (SECDEF) is authorized to provide for the following costs as an excepted expense under the provisions of Sec. 3732 R.S.:

1. the cost of an airborne alert,
2. the costs necessary for an increase in the number of military personnel on active duty beyond the number for which funds have been provided in the applicable appropriation act.

When SECDEF exercises the authority to incur the costs in item 1 or 2, be must immediately advise Congress and report monthly thereafter on the estimated obligations. These data must be provided by the cognizant military departments.

c. Secretary of Defense Controls.

Notwithstanding the authority contained in Sec. 3732 R.S., OSD requires that prior approval be obtained from SECDEF in situations where recourse to the exemption provisions is contemplated. In the situations cited in subpar. b, SECDEF prior approval is required; in the emergency circumstances cited in sub-par. a, every reasonable communications effort must be made to secure prior SECDEF approval before unilateral action may be taken by a subordinate command to exercise the authority of Sec. 3732 R.S.

4. BUDGETARY TRANSFER AUTHORITY.

The Department of Defense Appropriation Act annually contains language which grants to the Secretary of Defense authority, with the approval of the Office of Management and Budget, to transfer fund between appropriations or funds in the current fiscal year upon determination that such action is

necessary and in the national interest. The transfer authority normally is stated as a dollar limitation not to exceed a specified amount available to the Department of Defense for military functions covered by the act. Transferred amounts will be merged with and be made available for the same purpose and time period as the appropriation or fund to which transferred. Transfers shall not be authorized or requests for reprogramming made unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated an din no case where the item for which funds are requested has been denied by the Congress. The Secretary of Defense must notify the Congress promptly of all transfers. Requests for transfers are handled as reprogramming actions as outlined in par. 073301.

*5. CONTROL OF YEAREND OBLIGATIONS. The General Provisions of the DOD Appropriation Act (see Appendix A) contains a section which provides that, except for certain specifically delineated programs, not more than 20 per centum of annual appropriation shall be obligated during the last 2 months of the fiscal year. The Comptroller applies and monitors this restriction at the appropriation level. In addition, the Comptroller annually implements guidance provided by the Office of Management and Budget to control annual accounts at the end of a fiscal year. As a general policy, operations are to be carried out in the most effective and economical manner possible. The following general guidelines will governing incurrence of obligations at yearend. Obligation for the fourth quarter of the fiscal year will not exceed obligations for the third quarter, except where a higher level is fully justified to carry out a seasonal requirement or an essential program objective. Orders for supplies, materials, and equipment for the balance of a fiscal year will be kept to the minimum required to meet approved program needs. Purchases for inventory will be managed so

that inventories are maintained at no higher than normal levels. Generally, it would be expected that the number of weeks of inventory supply at the end of the year would not exceed the average end-of-month inventory for the first three quarters of a fiscal year. Additional purchase orders and contracts for goods or services (for delivery extending into the next fiscal year) may be entered into in cases that provide a comparative cost advantage to the Government. Employment will be held to the minimum necessary to accomplish the job and must be kept within any established end-of-year employment ceiling.

*073100 GENERAL

The action required to obtain release of appropriated funds by means of the apportionment process is the initial step in the budget execution phase. Apportionment is defined in DODDIR 7200.1 (see Volume 2, Appendix A) as "a determination by the Director of the Office of Management and Budget as to the amount of obligations which may be incurred during a specified period under an appropriation, contract authorization, other statutory authorizations, or a combination thereof, pursuant to 31 U.S. Code 1512." The law provides that appropriations or funds shall be apportioned so as to prevent obligation or expenditure of an accounting a manner which would require a deficiency or supplemental appropriation and so as to achieve the most effective and economical use of the amounts made available. It also authorizes, in connection with the apportionment of any appropriation, the establishment of reserves to provide for contingencies or to effect savings whenever possible. It prohibits any apportionment or reapportionment which would indicate a necessity for a deficiency or supplemental estimate except as requirements arise from laws enacted by Congress subsequent to the original budget request or from

emergencies involving the safety of human life, protection of property, of certain other unusual circumstances. in such instances a detailed report of the facts of the case must be submitted to Congress. Under some circumstances, the Office of Management and Budget exempts certain appropriations from apportionment relying on other financial controls in lieu thereof. Office of Management and Budget Circular No. A ... issued pursuant to 31 U.S. Code 1512, prescribes the forms and procedures for the required apportionment and reporting thereunder.

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(2)

No. 97-1930

In the Supreme Court of the United States

OCTOBER TERM, 1997

CESSNA AIRCRAFT COMPANY, PETITIONER

v.

JOHN H. DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether, consistent with the Anti-Deficiency Act, 31 U.S.C. 1341-1342, the statutes governing the apportionment of appropriations, 31 U.S.C. 1501 *et seq.*, and regulations implementing those statutes, an Executive agency may obligate funds after they have been appropriated by statute, but before they have been apportioned and allocated by the Executive Branch.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 126 F.3d 1442. The opinions of the Armed Services Board of Contract Appeals (Pet. App. 1b-68b, 1c-48c) are reported at 93-3 B.C.A. (CCH) ¶ 25,912 and 96-1 B.C.A. (CCH) ¶ 27,966, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1997. A petition for rehearing was denied on February 27, 1998. Pet. App. 1d-2d. The petition for a writ of certiorari was filed on May 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a contract that the Department of the Navy awarded to petitioner in 1983. The contract required petitioner to provide training and related technical and maintenance support to undergraduate naval flight officers at the Naval Air Station in Pensacola, Florida. The duration of the contract was for five program years, commencing August 1, 1984, and ending September 30, 1988. Pet. App. 5a-6a. Each program year ended on the last day of the government's fiscal year, September 30. *Id.* at 6a. The contract also gave the government an option to extend the contract for three additional years. The contract required that option to be exercised "not later than" October 1, 1988. *Id.* at 5c.

The contract was a multi-year services contract. Multi-year contracting is a method of procuring services without having the total funds available at the time of award. Pet. App. 3c. The contract was funded with annual "Operation and Maintenance" funds which were not available for obligation until October 1 of each fiscal year, and which expired on September 30 of each fiscal year. *Id.* at 4c.

By letter dated April 18, 1988, the Navy's contracting officer informed petitioner of the government's intent to exercise the option to extend the contract for three years. Pet. App. 8a, 9c. As the end of the fiscal year on September 30 approached, however, an Appropriation Act providing the necessary funds for expenditures under the contract, including the exercise of the option, had not been enacted. Accordingly, on September 26, 1988, the Navy's contracting officer advised petitioner that the government would exercise the option by sending the option modification by

facsimile to petitioner's offices on October 1, 1988, which was a Saturday. *Id.* at 36c.

As of Friday, September 30, 1988, the Appropriation Act for Fiscal Year (FY) 1989 had passed Congress, but had not yet been acted on by the President. Pet. App. 12c. On that day, a Navy budget analyst executed a Financial Accounting Data Sheet, post-dated to October 1, 1988, which made available funds for the government's exercise of the option. The document included a proviso that "EXECUTION OF THIS DOCUMENT IS CONTINGENT ON CONGRESSIONAL PASSAGE OF THE FY89 APPROPRIATION ACT OR OTHER AUTHORITY." *Ibid.* Also on September 30, 1988, the Navy contracting officer advised petitioner's personnel to "stand by their fax machines on October 1 to receive the option exercise," which was expected to be issued once the President had signed the Appropriation Act. *Id.* at 9a, 13c.[1]

On October 1, 1988, the contracting officer confirmed that the President had signed the FY 1989 Department of Defense Appropriation Act. She then removed the proviso from the Financial Accounting Data Sheet, signed the contract modification to exercise the three-year option, and transmitted it by facsimile to petitioner's offices. Pet. App. 14c. Following the Navy's exercise of the option, petitioner provided the services required by the contract throughout the three-year option period. *Id.* at 10a.

2. In 1991, petitioner submitted a claim to the Navy's contracting officer for approximately $25.7

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[1] The Navy scheduled no work to be performed by petitioner during the weekend of October 1-2, 1988. The Navy also did not propose, direct, or encourage petitioner to perform services or incur costs during that weekend. Pet. App. 21c-22c.

million in additional compensation, beyond that provided for in the contract, for work that it had performed during the three-year option period. Pet. App. 6b. The contracting officer did not issue a final decision within 60 days, and petitioner appealed that constructive denial of its claim to the Armed Services Board of Contract Appeals (ASBCA). *Ibid.* Petitioner contended, among other things, that the Navy's exercise of the three-year option on October 1, 1988, was ineffective because it took place before the Executive Branch had apportioned and allocated the funds appropriated by Congress for Fiscal Year 1989. Any exercise by the Navy of that option before apportionment and allocation of those funds, petitioner argued, would have violated 31 U.S.C. 1517(a), which prohibits federal officers and employees from making any expenditure or obligation "exceeding * * * an apportionment[,] or * * * the amount permitted by regulations prescribed under [31 U.S.C.] 1514(a) [regarding administrative division of apportionments]." See *id.* at 21a-22a, 8b-9b. Accordingly, petitioner argued, the services it performed between October 1, 1988, and September 30, 1991, should have been compensated as though they had been purchased under a new implied-in-fact contract, rather than the original contract that would have expired on September 30, 1988, but for the option to extend. *Id.* at 16a-17a.

The ASBCA denied petitioner's claim. Pet. App. 1b-68b, 1c-48c. The ASBCA specifically held, *inter alia*, that (1) the Navy's exercise of the three-year option prior to the apportionment of the appropriated funds did not violate Section 1517 (*id.* at 19b-23b); (2) the contracting officer had obtained funding authority to exercise the option (*id.* at 34b-36b); and (3) the

contracting officer had, in fact, properly exercised the option, and petitioner received it within the time allowed by the contract (*id.* at 30c-37c).

3. Petitioner then sought review in the Court of Appeals for the Federal Circuit, which affirmed the decision of the ASBCA. Pet. App. 1a-36a. The court first rejected the government's argument that petitioner lacked standing to contest matters relating to the Navy's compliance with federal funding statutes. *Id.* at 13a-17a. The court concluded that petitioner's claims were "grounded in the [Contract Disputes Act, 41 U.S.C. 607(d)]," rather than the funding statutes as such, Pet. App. 14a, because petitioner contended that its services were performed under an implied-in-fact contract, rather than the original contract, which had purportedly expired on September 30, 1988. *Id.* at 17a.

On the merits, however, the court rejected petitioner's contention that the Navy was prohibited from obligating funds for the option years before the Executive Branch had completed the apportionment process for funds appropriated by Congress for those years. Pet. App. 24a-25a. The court contrasted Section 1517(a), which prohibits federal officials from authorizing obligations "exceeding * * * an apportionment," with the stricter provisions of the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1), prohibiting federal officials from authorizing any obligation "exceeding an amount available in an appropriation" *or* "before an appropriation is made." Pet. App. 24a-25a. "For its part, Section 1517 prohibits government officials or employees from authorizing obligations that exceed apportionments, but says nothing about incurring obligations prior to carrying out the apportionment process. In sum, the relevant statutory provisions do not prohibit government agencies from

incurring contractual obligations before completing the apportionment process." *Id.* at 25a.[2]

The court also held that petitioner was not entitled to rely on a provision in the Department of Defense's Accounting Manual, which states that "apportionments * * * by OMB are required before funds may be obligated." Pet. App. 23a. That provision, the court concluded, is an internal "procedural rule" that does not create any rights enforceable by a contractor. *Id.* at 28a. The Manual merely "encourages Navy officials to follow particular administrative procedures to ensure that obligated funds are properly accounted for, thereby preventing officials from obligating more funds than have been appropriated." *Id.* at 27a.

Finally, the court concluded that the Navy's exercise of its option on October 1, 1988, complied with the terms of the contract, which allowed the Navy to exercise the option "not later than 1 October 1988." Pet. App. 30a. The court found that the Navy's exercise of that option by facsimile message was consis-

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[2] In addition, the court noted, the Navy Comptroller Manual (NCM) specifically contemplates the possibility of incurring obligations before apportionment. Pet. App. 25a. That Manual states that "[a]fter the beginning of the fiscal year and prior to the specific allocation of funds * * * the head of the responsible office * * * is authorized by the Comptroller of the Navy to suballocate funds and to issue allotments under any appropriation act of such fiscal year in such amounts as will not exceed the amount contained in the appropriation warrant or the request for apportionment and allocation submitted to the Controller of the Navy." *Id.* at 25a-26a. This provision, the court concluded, "permits allotments and suballotments to be issued before apportionment." *Id.* at 26a.

tent with the parties' "established practice" of faxing modifications. *Id.* at 31a.

ARGUMENT

The court of appeals' decision that the Navy was legally permitted to exercise its option to extend its contract with petitioner after the Department of Defense's Appropriation Act was enacted, but before funds under that Act were apportioned and allocated, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Federal law requires that appropriations made by Congress for a definite period "shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period." 31 U.S.C. 1512(a). This requirement of apportionment is intended largely to ensure that federal agencies do not spend their appropriated funds at too rapid a rate, thereby necessitating a supplemental appropriation later in the fiscal year. The President is directed by statute to make apportionments of appropriated funds, 31 U.S.C. 1513(b)(1), and apportionments for funds under Appropriation Acts must be made not later than 20 days before the beginning of the fiscal year for which the appropriation is made or 30 days after the date of the enactment of the Appropriation Act, whichever is later, 31 U.S.C. 1513(b)(2). The President has delegated his responsibility for apportioning funds to the Office of Management and Budget (OMB). See 2 General Accounting Office, *Principles of Federal Appropriation Law* 6-72 (2d ed. 1992).

The statutory requirement that appropriated funds be apportioned is a central aspect of the laws govern-

ing expenditures by federal agencies. Indeed, once funds are apportioned by OMB, federal law prohibits federal officers and employees from spending or obligating funds in excess of any apportionment. 31 U.S.C. 1517(a). Nevertheless, the court of appeals was correct to conclude that Section 1517 does not prohibit federal agencies from obligating previously appropriated funds before the completion of the apportionment process.

Section 1517 provides:

> (a) An officer or employee of the United States Government * * * may not make or authorize an expenditure or obligation exceeding—
>
> (1) an apportionment.

The language of Section 1517(a) stands in marked contrast to that of the Anti-Deficiency Act, which prohibits any government expenditure or obligation of funds either "exceeding an amount available in an appropriation," 31 U.S.C. 1341(a)(1)(A), or "before an appropriation is made," 31 U.S.C. 1341(a)(1)(B). Section 1517 does not contain any prohibition against expenditures or obligations made before the completion of the apportionment process. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

It is, moreover, sensible to conclude that Congress would have wanted to permit expenditure . . obligation of appropriated funds in certain circumstances even before they are apportioned by OMB pursuant to the statutory procedure, including the timetables set

forth in 31 U.S.C. 1513(b)(2). In a situation like the one in this case, where the Appropriation Act was signed by the President on the first day of the fiscal year, delaying obligations or expenditures until the apportionment process is completed could result in the disruption of important federal operations, including services authorized under multi-year contracts. Internal agency procedures, moreover, can effectively prevent spending of appropriated funds at too rapid a rate before the apportionment is made. Thus, the court of appeals pointed out that the Navy Comptroller Manual (NCM) ¶ 022064 permits the expenditure of appropriated funds before their apportionment, but only "in such amounts as will not exceed the amount contained in the * * * request for apportionment and allocation submitted to the Comptroller of the Navy." Pet. App. 25a-26a.

The court also correctly determined that no regulatory authority prohibited the Navy from exercising the three-year option before the apportionment of the appropriated funds. The NCM specifically permits contracting officers to expend appropriated funds during the pendency of the apportionment process within limits designated in the Navy's apportionment request. NCM ¶ 022064 provides more completely:

> After the beginning of the fiscal year and prior to the specific allocation of funds pursuant to apportionment to the head of the responsible office[,] * * * the head of the responsible office is authorized by the Comptroller of the Navy to suballocate funds and to issue allotments under any appropriation act of such fiscal year in such amounts as will not exceed the amount contained in the appropriation warrant or the request for

> apportionment and allocation submitted to the Comptroller of the Navy. * * * Upon issuance of the approved budget activity allocations pursuant to apportionment, the limitations of such allocations will apply to all suballocation and allotment action prior to the receipt of such budget activity allocations.

Pet. App. 25a-26a. The Federal Circuit correctly concluded that this "provision permits allotments and suballotments to be issued before apportionment, with restrictions as to their amounts. It would logically follow that obligations may also be incurred, with the same amount restrictions." *Id.* at 26a.[3]

2. Petitioner relies also (Pet. 20) on a provision in the Department of Defense's Accounting Manual to argue that the Navy's exercise of its option was illegal. That contention was properly rejected by the court of appeals. Paragraph 4a of the Manual states: "An apportionment or reapportionment is a distribution made by OMB of amounts available for obligation in an appropriation or fund account. *Except in certain instances* * * * apportionments and reapportionments by OMB are required before funds may be obligated." Pet. App. 13b (emphasis added). That provision does not contradict either the statutes or the NCM provision discussed above, but rather states a general rule that funds should not be spent before they are apportioned, and recognizes the possibility of exceptions to that general rule. In any event, the

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[3] Petitioner (Pet. 21) does not address NCM ¶ 022064, but relies instead upon NCM ¶¶ 073002(2) and 073100 (Pet. App. 24f, 28f). As the Federal Circuit held, these provisions "say nothing about the timing of incurring obligations versus carrying out the apportionment process." *Id.* at 25a.

court correctly concluded (*id.* at 27a) that Paragraph 4a of the Manual is an "internal operating provision for the management of funds within the agency" and does not create any right enforceable by a contractor. The Manual was "not intended primarily to confer important procedural benefits upon individuals," *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 539 (1970), but rather was promulgated to establish procedures governing the management of the agency. As such, it does not afford petitioner any private rights enforceable in the courts.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1998

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[4] Petitioner (Pet. 23-26) errs in contending that the court of appeals held that it lacked standing. To the contrary, the court expressly held that petitioner had standing to challenge the Navy's compliance with the funding statutes. Pet. App. 13a-17a. The court did hold that the Manual created no enforceable rights for petitioner's benefit (*id.* at 27a), but that holding was phrased in terms of substantive law, not standing.

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No. 97-1930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE CESSNA AIRCRAFT COMPANY,

Petitioner,

v.

JOHN H. DALTON,
SECRETARY OF THE NAVY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

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15 pp

QUESTIONS PRESENTED

Whether an Executive Branch agent can obligate and spend newly appropriated funds before the President has apportioned those moneys as required by statutes intended to effect Congress' plenary authority under Article I, Section 9, Clause 7 of the Constitution?

Whether a valid contract can exist notwithstanding the fact that it is based on violations of statutes and regulations governing the obligation of funds from the Treasury?

Whether a contractor has standing to challenge the validity of a contract that was based on a violation of statutes and regulations and that caused financial harm to that contractor?

RULE 29.6 STATEMENT

Petitioner The Cessna Aircraft Company is a wholly-owned subsidiary of Textron Inc.

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REPLY BRIEF OF PETITIONER

Petitioner, The Cessna Aircraft Company ("Cessna"), hereby replies to the Brief for the Respondent in Opposition.

The issue in this case is whether statutes enacted to protect the Constitutionally grounded power of the purse are subordinate to a low-level bureaucrat's immediate, parochial interests in exercising a contract option. Respondent's success in convincing lower tribunals that administrative expediency and convenience are paramount arises because this Court has never spoken definitively on the separation of powers issue presented here.

Previously, this Court has ruled that Congress cannot, even for sound policy reasons, arrogate to the Executive the option of dispensing with Constitutionally mandated procedures governing the appropriation of money. *See Clinton v. City of New York*, 118 S. Ct. 2091, 2107-08 (1998). This Court has also held that laws governing the Executive's authority to obligate appropriated money must be strictly construed. *See Hercules Inc. v. United States*, 116 S. Ct. 981 (1996). Consistent with those holdings, the Court should strictly construe the apportionment statues at issue in order to compel the Executive to place compliance with those mandated procedures ahead of expediency.

ARGUMENT

Respondent's position depends entirely on two premises: that the apportionment statute is ambiguous (and inconsequential); and that Congress intended for Executive officials to circumvent the apportionment process when exigent circumstances make doing so expedient. Both premises are flawed. First, the statute is not ambiguous, and the rule of statutory construction advocated by Respondent is inapposite. Second, the interpretation that Respondent urges would render illusory Congress' mandate prohibiting the Executive from obligating and expending funds in excess of an apportionment.

Respondent agrees that 31 U.S.C. § 1512(a) (1994) requires the President to apportion appropriations to prevent federal agencies, such as the Navy, from spending appropriated funds too rapidly. (Brief for the Respondent in Opposition ("Opp.") at 7.) In fact, the President's lawful authority to allocate and impound appropriated funds under the statutes discussed in *Clinton v. City of New York*, 118 S. Ct. 2091, 2107 (1998), depends entirely on the Executive's compliance with the

statutorily mandated apportionment process. As Respondent correctly notes, that apportionment process "is a central aspect of the laws governing expenditures by federal agencies." (Opp. at 7-8.) Respondent also agrees that federal law prohibits the obligation and expenditure of funds in excess of any apportioned amount. (*Id.*) Respondent then admits that the Navy's contracting officer obligated all of the appropriated money at issue *before* the President apportioned any of it. (Opp. at 7.) This was entirely legal, according to Respondent, solely because the word "before" does not appear in the text of 31 U.S.C. § 1512(a), meaning that an Executive official can obligate and expend all appropriated money so long as the President has not *yet* apportioned *any*. (Opp. at 8.)

Section 1517(a) provides that officers and employees of the Government "may not make or authorize an expenditure or obligation exceeding – (1) an apportionment." 31 U.S.C. § 1517(a). Respondent agrees that this provision renders unlawful obligating or expending money exceeding an apportionment. Logic and reason dictate that where no funds have been apportioned, any amount obligated or expended exceeds the amount apportioned - none.

Casting logic and reason aside, Respondent advances a cynical alternative that would render illusory a set of laws that are the cornerstone to protecting the power of the purse. By spending an entire appropriation *before* receiving authority to spend a restricted amount, a bureaucrat avoids spending more than the restricted amount. In other words, the law is not violated; it is evaded. A low-level bureaucrat does not usurp Presidential authority; the bureaucrat just exercises it (thereby precluding the Executive from any decision).

Avoiding the illogic created by its cavalier application of the apportionment statutes, Respondent conjures a

nonexistent ambiguity. Respondent cites language from the Anti-Deficiency Act (31 U.S.C. § 1341) for guidance in interpreting § 1517. Doing so violates the most basic rule of statutory construction, one that is essential to keep courts from legislating a result favored by a party over that which is dictated by plain language. *See, e.g., Estate of Cowart v. Nichols Drilling Co.*, 505 U.S. 469, 475 (1992) (when statute's language is clear, court does not look for another meaning); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873 (1991).

Even if the language of the apportionment statute were not clear enough, the provisions of the Anti-Deficiency Act do not support Respondent's interpretation of § 1517(a). In language virtually identical to that appearing in the apportionment statute, the Anti-Deficiency Act prohibits expenditures and obligations "exceeding an amount available in an appropriation." 31 U.S.C. § 1341(a)(1)(A). A second provision also prohibits officials from involving the government "in a contract or obligation for the payment of money before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B). This prohibition has historically meant that officials could not obligate money on a contract *in excess* of an appropriation for that contract, and the Supreme Court recently affirmed that interpretation. *Hercules Inc. v. United States*, 116 S. Ct. 981, 986 (1996) (The Anti-Deficiency Act "bars a federal agency employee or agency from entering into a contract for future payment of money in advance of, or in excess of, and existing appropriation.")

No legislative history nor applicable rule of statutory construction dictates a different interpretation of that Act today. In citing the current codification of the Anti-Deficiency Act, Respondent ignores the Act's history. In 1820, Congress prohibited the Executive from entering into contracts except "under a law authorizing the same,"

(*i.e.*, where no money was available for that purpose. Ch. 52, 3 Stat. 567 (1820). (Pet. App. 1e.)[1] In 1870, Congress recodified that same prohibition by stating that "it shall not be lawful for any department . . . to involve the government in any contract for the future payment of money in excess of [an appropriation.]" Ch. 251, § 7, 16 Stat. 251 (1870) (Pet. App. 1e.) Though Congress used the phrase "in excess of," there is nothing to suggest that it was now permissible to enter into contracts in advance of appropriations. Respondent's serendipitous semantic discovery is no basis for altering a well-established statutory interpretation of laws designed to protect separation of powers principles.

The 1870 act was recodified yet again in 1905 to prohibit the involvement of the Government "in any contract or obligation for the future payment of money "in excess of such appropriation." Ch. 1484, § 4, 33 Stat. 1257 (1905). (Pet. App. 2e-3e.) In 1950, Congress again recodified the Anti-Deficiency Act to prohibit involving the government "in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose." Ch. 896, § 1211, 64 Stat. 763, 765-68 (1950) (Pet. App. 3e-9e.) The most recent codification of that prohibition occurred when the Anti-Deficiency Act was recodified as 31 U.S.C. § 1341(a)(1) to prohibit the Executive from entering contracts "before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B) (Pet. App. 10e.) Thus, since 1820 the Executive can only sign contracts for which is already has enough money to cover the obligation to pay.

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[1] "Pet. App." refers to the Appendix in the Petition.

Though the exact words used in the 1820 act and the ensuing recodifications have changed with time, no legislative history or other authority supports the proposition that Congress intended to change in any respect the prohibition contained in the Anti-Deficiency Act: obligating the government to pay any amount greater than that expressly made available for a given purpose. This immaterial change in the language of the Anti-Deficiency Act, however, is the basis for Respondent's current interpretation of the apportionment statute. What Respondent urges this Court to presume, therefore, is that when Congress recodified the Anti-Deficiency Act, 31 U.S.C. § 1341, using the word "before" in lieu of the phrase "in advance of" or "in excess of," Congress intended to give low-level bureaucrats discretionary authority to circumvent the apportionment statute, 31 U.S.C § 1571(a).

Respondent cites only one case to support its remarkable assumption that Congress implicitly intended for low-level bureaucrats to obligate for a parochial purpose money that the President has not made available for any purpose: *Russello v. United States*, 464 U.S. 16 (1983). *Russello* does not address the Constitutional principles at issue here.

Russello was convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO). The Court had to decide whether insurance proceeds obtained by Russello as a result of his arson activities should be forfeited as an "interest . . . acquired . . . in violation of [RICO]." *Id.* at 17. In rejecting Russello's narrow interpretation of "interest," the Court noted that the applicable forfeiture provision, § 1963(a)(1) "speaks broadly of 'any interest' . . . acquired" while the immediately preceding subsection, § 1963(a)(2) expressly limits the meaning of the word. *Id.* at 23. Had Congress

intended similarly to limit the meaning of "interest" for purposes of § 1963(a)(1), it could have done so.

Even if there were a need to resort to rules of statutory construction, nothing in *Russello* supports Respondent's argument. Petitioner agrees that when Congress intends to use the same word differently within a statute, courts must construe each provision as Congress intended. That, however, is not what Respondent is advocating. Respondent advocates a new rule whereby the Legislature can convey intent only through a designated word or phrase. Once that intention is understood, only that word or phrase can express the same purpose in another provision – regardless of what effect interpreting its omission from the other provision would have on enforcing that provision's purpose. *Contra Arkansas v. Farm Credit Serv. of Cent. Ark.*, 117 S. Ct. 1776, 1780 (1997) (statute must be enforced according to its terms, and court must guard against statutory interpretation that might defeat Congressional purpose).

Using Respondent's rule of interpretation, Respondent would have this Court presume that Congress intended to open a loophole in the *apportionment statute* when it recodified the *Anti-Deficiency Act* using the term "before" without incorporating that same term simultaneously in the apportionment statutes.[2] Through this loophole conjured by Respondent, a low-level bureaucrat could obligate an entire appropriation without regard to the President's statutorily mandated obligation to prevent the bureaucrat from doing precisely that. Such a

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[2] This Court did not attach significance to the language change upon which Respondent's theory depends. *See Hercules*, 116 S. Ct. at 987.

delegation of authority over funds appropriated by the Congress pursuant to its power of the purse ought not to be inferred for expediency sake, especially where the plain reading of the statute dictates the opposite result. *See Clinton*, 118 S. Ct. at 2108. ("The Constitution's structure requires a stability which transcends the convenience of the moment.") (Kennedy, J., concurring).

Respondent's current interpretation serves only that which it views as expedient under the exigent circumstances created by it in this case. Without citing any support or providing any rationale, Respondent states that it would be "sensible to conclude that Congress would have wanted to permit expenditure or obligation of appropriated funds in certain circumstances even before they are apportioned by OMB pursuant to the statutory procedure, including the timetables set forth in 31 U.S.C § 1513(b)(2)." (Opp. at 8-9.) Had Congress deemed it "sensible" to do so, it could have done as Respondent suggests.[3] That Congress chose not do so for circumstances that Respondent deems "sensible" does not confer on a court the Legislature's prerogative to create a statutory exemption.[4]

The last time Respondent urged an interpretation of this statute to serve immediate needs, it adopted

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[3] In fact, § 1516 sets forth explicitly the exemptions that Congress deemed appropriate, and does not include "a situation like the one in this case" described by Respondent. (Pet. App. 18e.)

[4] At the root of this case is Congress' continuing inability to complete the appropriations process by the beginning of each fiscal year. Respondent's position, in essence, seeks to involve the Court in pandering to this continuing lack of discipline by a coordinate branch.

Petitioner's argument. NAVAIR, the same procuring activity appearing here as the Respondent, argued that funds were not available to a contracting officer because the President had not apportioned them. Much like in the underlying facts of this case, the *Appeal of The Boeing Co.*, ASBCA No. 37579, 90-3 BCA ¶ 23,202, involved NAVAIR's attempt to exercise a contract option when the availability of funds was in question. NAVAIR inserted into its contract with Boeing an option extension provision preserving NAVAIR's ability "to keep open the Government's right to exercise its fiscal year production options if funds were not appropriated before the beginning of the applicable fiscal year." *Id* at 116,435[5]

The provision gave NAVAIR the right to exercise its option within sixty days "'after funds are made available from the Congress/President.'" *Id.* Boeing and NAVAIR disputed whether the option was exercised timely. In support of NAVAIR's case,

> the government [urged] "that the only reasonable construction of the language . . . would be *that funds are not made available by the President until all the statutory and regulatory requirements have been satisfied which must occur prior to the obligation of funds by the contracting officer*[.]" (Gov't br. at 9).

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[5] The provision was deemed necessary in the event that funds were not available on the first day of the fiscal year. *Id.* In other words, NAVAIR provided *by contract* for the "situation like the one in this case, where the Appropriation Act was signed by the President on the first day of the fiscal year." (Opp. at 9.) Thus, the proper solution for a situation like this would have been to provide for it in the contract, not to redraft the apportionment statute as Respondent suggests.

Id. at 116,439 (emphasis added). In other words, according to Respondent, a NAVAIR contracting officer, like the one in this case, cannot expend or obligate funds unless and until they are made available through the apportionment process. Petitioner agrees, and has set forth that position before this Court.

Respondent, apparently, has changed its preferred interpretation. The proper interpretation of laws central to governing expenditures depends not on plain language, rules of construction, or even what "it is . . . sensible to conclude." Rather, the interpretation Respondent would advocate depends entirely on which of its parochial interests will be advanced in a given case. Petitioner urges the Court to give the issue the proper consideration that it is due, and to give the statute the meaning that was intended by the Congress.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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